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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-778

TORA C. BRENNAN,

Plaintiff,

v.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,

Respondent,

APPEAL OF CLAUDE M. HERRIMAN, OTTO L. KEELER, JR., OTTO L. KEELER, JR., AS EXECUTOR OF THE ESTATE OF OTTO L. KEELER, SR., AND ALBERT W. COLLIER,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Indianapolis, Indiana 46204,
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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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MIDWESTERN UNITED LIFE INSURANCE COMPANY,

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APPEAL OF CLAUDE M. HERRIMAN, OTTO L. KEELER, JR., OTTO L. KEELER, JR., AS EXECUTOR OF THE ESTATE OF OTTO L. KEELER, SR., AND ALBERT W. COLLIER,

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PETITION FOR CERTIORARI.

OPINION BELOW.

Claude M. Herriman, Otto L. Keeler, Jr., Otto L. Keeler, Jr., as Executor of the Estate of Otto L. Keeler, Sr., and Albert W. Collier, on behalf of themselves and all persons similarly situated (hereinafter sometimes "Petitioners" or "Class") respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered

August 3, 1971 and rehearing denied on September 23, 1971. The opinion of the Court of Appeals, not yet officially reported, appears in Appendix I hereto. The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, denying Petitioners' Rule 60 motion was not reported but appears in the certified record of this cause.

JURISDICTION.

The opinion and judgment of the Court of Appeals for the Seventh Circuit was dated and entered on August 3, 1971. A timely Petition for Rehearing En Banc was filed, which Petition was denied on September 23, 1971. The order denying the rehearing petition is set out in Appendix II. This Petiiton for Certiorari is filed within ninety days after the date the Petition for Rehearing was denied. This Court's jurisdiction is invoked under and pursuant to 28 USC §1254.

QUESTIONS PRESENTED.

The majority opinion of the Court of Appeals for the Seventh Circuit raises issues of exceptional importance and concern in that it interprets Rules 23, 33, 34 and 37 of the Federal Rules of Civil Procedure in such a way as to allow dismissal with prejudice of absent class members' claims prior to the time the representative plaintiff's case is determined. Under the majority decision, absent class members may be deprived of their rights without a trial, in an involuntary proceeding in which they are not served with process, have never appeared and whose interests, as a class, are not represented in the proceeding.

This decision of the majority, if allowed to stand, may well sound the death knell for Rule 23 class actions as every talented and resourceful defense counsel will file broad motions to produce and extensive and burdensome

interrogatories, as was done in this case, in order to reduce the size of the class prior to trial on the merits of the representative plaintiff's case.

The majority opinion fairly states the issue presented: "The issue on this appeal is whether, in a class action under Rule 23, Fed. R. Civ. P., those identifiable absent members of the representative plaintiff's class who received notice of the pendency of this suit and neither elected to be excluded nor entered an appearance may be required to submit to discovery under Rules 33 and 34, Fed. R. Civ. P. (prior to the trial of the named representative plaintiff's case in chief—added) on pain of dismissal of their claims with prejudice for failure to respond."

STATEMENT OF THE CASE.

Shortly after the death of its President in a helicopter crash in 1965, Dobich Securities Corporation filed a voluntary petition in bankruptcy in the District Court at Indianapolis.

An extensive fraud had been perpetrated upon some 550 persons who had paid Dobich up to $3 million to purchase stock of Midwestern United Life Insurance Company but who had never received delivery of their certificates. The President of Dobich Securities Corporation had been creating and maintaining a "market" in over the counter trading. By action and inaction, the insurance company had aided and abetted Michael Dobich in his defalsification, and had benefited from his activities in maintaining the market. The nature, extent, amount of the fraud and the identity of the victims was immediately known.

Among other suits, an action was filed by Tora C. Brennan in the United States District Court for the Northern District of Indiana, Fort Wayne Division. The District Court's opinion authorizing the plaintiff, Mrs. Bren-

nan, to proceed as a representative party for the class of defrauded persons is set out in *Brennan* v. *Midwestern United Life Insurance Company*, 259 F. Supp. 673 (N. D. Ind. 1966). Notice was directed to all members of the class advising them pursuant to the Rule that they could request exclusion or appear but otherwise they would be adequately represented and bound by a judgment for or against the named plaintiff.

Upon motion by Midwestern United Life Insurance Company, without hearing or objection by the named plaintiff's counsel, the Court entered an order directing absent class members to produce documents and answer extensive interrogatories. Petitioners consist of those 113 persons whose claims were dismissed with prejudice by the District Court prior to trial for failure to furnish documents or answers to interrogatories.

The opinion of the District Court establishing liability against Midwestern United Life Insurance Company on behalf of the plaintiff and those similarly situated is set out in *Brennan* v. *Midwestern United Life Insurance Co.*, 286 F. Supp. 702 (N. D. Ind. 1968); was affirmed by the Court of Appeals at 417 F. 2d 147 (1969); and certiorari was denied at 397 U. S. 989 (1970).

Petitioners filed a timely motion under Rule 60 in the Fort Wayne District Court proceedings (then pending and still open) and further filed a separate action in the District Court for the Southern District of Indiana, Indianapolis, in order to toll the statute of limitations for a Rule 10-b-5 action. This action is also still pending.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Raises Significant and Important Undecided Questions Concerning "Discovery" of Absent Class Members Which Should Be Passed Upon by This Court.

The question of whether or not the absent class members are "parties" within the meaning of Rules 33, 34, and 37, and therefore subject to interrogatories and motions to produce documents prior to the trial of the representative plaintiff's case and the sanctions flowing therefrom, is a question of extreme significance and importance to the orderly administration of Rule 23 litigation in the District Courts.

Rule 23 as a measure to economically and expeditiously handle multi-party litigation, takes on added importance today when Congress is expanding the statutory jurisdiction of District Courts. It is of further importance to note that the ends of justice and an orderly society demand that each man be represented by counsel. These questions should be settled by the Court in order to protect the rights of involuntary litigants in Rule 23 actions.

There are no real guidelines and the decisions which have touched upon the question, either directly or obliquely, are in conflict. The majority opinion in the Court of Appeals acknowledges this fact and stated as follows:

> *"Note should be made initially that there is a paucity of recorded precedent in this area. A few district courts have indicated that some form of discovery may be required of class members.* E.g., *Harris* v. *Jones*, 41 F. R. D. 70, 74-75 & nn. 9 & 10 (D. Utah 1966); *Minnesota* v. *United States Steel Corp.*, 44 F. R. D. 559, 577-78, 582 (D. Minn. 1968); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 43 F. R. D. 452, 459 (E. D. Pa. 1968). *But cf. Korn* v. *Franchard Corp.*, 50

F. R. D. 57, 59-60 (S. D. N. Y. 1970); *Berman* v. *Narragansett Racing Ass'n*, 48 F. R. D. 333, 338 (D. R. I. 1969)."

In *Harris* v. *Jones*, an early case after the 1966 amendment to Rule 23, the Court simply stated a further notice would be directed to members of the class "requiring them to file simple statements of their claims upon furnished forms." A "simple statement" of claim on forms furnished is a far cry from extensive interrogatories and motions to produce documents as required by the District Court in this case. The *Philadelphia Electric* case and the *United States Steel* case are both anti-trust cases. In those cases, it was important to know the dimension of the class and the amounts of probable claims. In this case, all of these facts were known, and as in most 10b-5 cases, damages are a simple mathematical calculation. None of these cases directly or by implication authorized the extremely broad discovery allowed by the District Court, nor do they authorize the unduly harsh sanction of dismissal with prejudice utilized by the District Court against these petitioners.

The *Korn* case points out the ". . . fundamental inconsistency in providing on the one hand, that a member who fails to request exclusion shall be included in the class and, on the other hand, that a member who fails to file a proof of claim shall be excluded from any recovery." The Court in the *Berman* case distinguished *Philadelphia Electric* and refused to require "some minimum affirmative response" from class members prior to the establishment of liability.

Judge Bernard M. Decker of the United States District Court for the Northern District of Illinois has refused to allow interrogatories to absent class members in *State of Illinois* v. *Harper & Row Publishers, Inc.* and related cases, Cause No. 67-C-1899. A copy of Judge Decker's unre-

ported opinion dated February 13, 1970, is set out as Appendix III to this Petition. Judge Decker states in that order:

> ". . . as applied to class members who are not formal parties, this interrogatory would accomplish what this court has repeatedly refused to allow, for it would effectively extend the Exhibit 'D' interrogatories to these plaintiffs."

The Court went on to point out that:

> "In a case of this nature, with each plaintiff's stake relatively small, requiring investigation and preparation of answers to multitudinous interrogatories by each plaintiff might well serve to close the judicial doors of class actions of this nature."

Judge Lord of the United States District Court, Southern District of New York, has reached the same conclusions with regard to claim form in the *Antibiotic Drugs* anti-trust actions in the *Consumer Class Action* reported in 1971 *CCH Trade Regulation Reporter*, § 73,482, as follows:

> "The defendants argue that Rule 23 requires each class member to come forward with his claim prior to trial . . . If these cases cited by the defendants were relevant at all, it is on the question of when absent class members must come forward with proof of their claims, and it is doubtful that such a burdensome requirement should be imposed on a class like the present one where the injury has been spread over a large number of purchasers, none of whom may have a claim large enough to justify the expense of preparing a proof of claim form until they are assured of a recovery. *Cf. Korn* v. *Franchard Corp.*, 50 F. R. D. 57 (S. D. N. Y. 1970). It would seem far better to defer the filing of proof of claims by the individual members of these classes until after these cases have gone to trial and judgment. If the representatives

of these classes are successful on behalf of the absent class, the members will know that their efforts in proving their individual claims will be rewarded."

These cases point out the inconsistency of the reported case law, and the need for guidance and direction by this Court, in order to correct the erroneous interpretation of the Rules, the case law and Constitutional requirements heretofore made by the District Court and the Court of Appeals.

II. One District Court Has Flatly Refused to Follow the Reasoning of the Majority Opinion.

Since the majority opinion was rendered in this case, at least one court, in the only known reported case at this time, has taken exception to the majority opinion in this cause and refused to follow it. Chief Judge James F. Gordon of the United States District Court for the Western District of Kentucky at Louisville, in the case of *Fischer* v. *Wolfinbarger* reported in *CCH, Federal Securities Reporter*, § 93,235, and stated as follows:

> "The defendant argues that the proposed interrogatories to class members are appropriate in light of the decision of the United States Court of Appeals for the Seventh Circuit in *Brennan* v. *Midwestern United Life Insurance Co.* on the appeal of Claude M. Herriman, et al., ... F. 2d ..... (7th Cir. August 3, 1971).

> * * * * *

> "The Court is clear to the view that discovery proceedings, such as the proposed interrogatories, are improper, directed as they are to members of the class who are not named plaintiffs. The class action is designed for the situation as Rule 23(a)(1) specifically contemplates, where 'the class is so numerous that joinder of all members is impracticable.' It is designed to provide a fair and efficient procedure for

handling claims where the claims or defenses of the represented parties are typical of the claims or defenses of the class, where there are questions of law or fact common to the class, and where it is fair to conclude that the representative parties will fairly and adequately protect the interests of the class. It is not intended that members of the class should be treated as if they were parties plaintiff, subject to the normal discovery procedures, because if that were permitted, then the reason for the rule would fail."

III. Judge Stevens' Dissenting Opinion Succinctly Sets Out the Reasons Why the Writ Should Be Granted and the Case Reversed.

Petitioners were not voluntary or involuntary parties in the District Court; were not given the right to exclude themselves in lieu of responding to discovery; their separate interests were not represented in Court; and the judgment purporting to dismiss the petitioners' claims with prejudice is a nullity.

Petitioners are frankly unable to state the compelling reasons for granting the Writ and reversing the case with greater clarity or brevity than pointed out by Judge Stevens' dissent:

> "Movants were not parties to the litigation in which the district court purported to adjudicate their rights. They were not involuntary parties because they were not served with process. None of them became voluntary parties by entering an appearance or taking any other affirmative action.
>
> "A litigant may 'stand in judgment' for absent parties only to the extent that their interests are of the same class. *Hansberry* v. *Lee*, 311 U. S. 32, 44. In this case no litigant stood in judgment for movants. The judgment purporting to dismiss their claims with prejudice was predicated solely on a factor which differentiated them from the rest of the class.

"Unlike the other class members, movants were unwilling or unable to respond to the discovery orders. In my opinion, they had a right to request exclusion from the class as an alternative to responding; they were never advised of any such right, and no such request was made on their behalf. They had no representative in court to advocate protection of their separate interests, whatever they may have been, in not divulging the requested information. Yet it is those separate interests which led to the entry of a judgment against them.

"If the class was to be divided into two parts, each was entitled to separate representation by a party qualified to stand in judgment for absent members before their rights could be determined. In my opinion the requirement of adequate representation refers less to the professional competence of counsel than to the identity of the interests of the representative party and those for whom he is permitted to stand in judgment. In this case movants' interest in avoiding the sanction of dismissal with prejudice—as opposed to the possible sanction of exclusion from the class—was a matter of indifference to the representative plaintiff. For that reason, which is entirely unrelated to the skill of counsel, movants were not adequately represented by any party to the case.

"Since they were not parties to the litigation, movants could not be direct parties to the judgment. Since the judgment did not even purport to bind any party who represented them, it had no indirect impact on their rights. Indeed, in my opinion, a judgment which does not even purport to bind any party to the litigation is a nullity.

"I respectfully dissent."

The significance of the questions herein transcend the immediate case. Judges and counsel need guidance in terms of having a consistent and unconfused procedure which will satisfy the Constitutional requirements of due

process. For every resourceful plaintiff's counsel who files a Rule 23 class action, there is an equally able and resourceful defendant's lawyer who will attempt to discourage and fragmentize the class prior to trial.

Under the majority decision, interrogatories to absent class members will become the practice in every class action, and the favorite stratagem of the defense in order to fragment the class prior to negotiation for settlement or the trial on the merits of the representative claim. The opinion invites, among others, the following questions and legal problems which were overlooked: (a) How many sets of interrogatories may be filed? (b) Who will decide when answers are complete? (c) Can class members be dismissed with prejudice if the interrogatories are returned undelivered by the Post Office? (d) Who will represent the separate interests of those unable or unwilling to answer improper interrogatories or produce documents?

The questions are endless once we abandon traditional concepts of parties, process and jurisdiction.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this case is a particularly appropriate one for the exercise of this Court's discretionary jurisdiction and this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX I.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term, 1970 — April Session, 1971

No. 18682
TORA C. BRENNAN,
Plaintiff,

v.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,
Defendant-Appellee,

APPEAL OF CLAUDE M. HERRIMAN, OTTO L. KEELER, JR., OTTO L. KEELER, JR., as Executor of the Estate of Otto L. Keeler, Sr., ALBERT W. COLLIER,
Movants-Appellants.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

AUGUST 3, 1971

Before SWYGERT, *Chief Judge*, CUMMINGS and STEVENS, *Circuit Judges.*

SWYGERT, *Chief Judge.* The issue on this appeal is whether in a class action under Rule 23, FED. R. CIV. P., those identifiable absent members of the representative plaintiff's class who received notice of the pendency of the suit and neither elected to be excluded nor entered an appearance may be required to submit to discovery

under Rules 33 and 34, FED. R. CIV. P., on pain of dismissal of their claims with prejudice for failure to respond This issue arises out of the denial of appellants' (hereinafter designated "movants") motion under Rule 60(b), FED. R. CIV. P., which asserted that the dismissal of their claims and those of all others similarly situated for noncompliance with a discovery order was void under clause (4) of Rule 60(b) or should have been set aside under residual clause (6) of that rule.[1]

The underlying class action from which movants were dismissed was instituted by Tora C. Brennan against Midwestern United Life Insurance Company. In that action the plaintiff alleged that Midwestern had violated section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, promulgated thereunder, by aiding and abetting the fraudulent conduct of Michael Dobich, a dealer in securities. The plaintiff asked damages for herself and for all others, including movants, who never received delivery of stock in Midwestern which they had purchased from Dobich. The district court, at a bench trial, found for the plaintiff and all the remaining mem-

1. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment order, or proceeding was entered or taken.

bers of her class. *Brennan v. Midwestern United Life Ins. Co.*, 286 F. Supp. 702 (N.D. Ind. 1968). On appeal this court affirmed, 417 F. 2d 147 (1969), and certiorari was denied by the Supreme Court, 397 U. S. 989 (1970).

The facts forming the basis for the district court's determination of Midwestern's liability are fully set forth in Judge Eschbach's opinion, 286 F. Supp. 702, and need not here be repeated. We deem it necessary, however, to state the circumstances leading to the dismissal of movant's claims during the pendency of the action and to the subsequent motion under Rule 60(b).

Shortly after a determination that the suit should be maintained as a class action, 259 F. Supp. 673 (1966), the district court, on October 12, 1966, caused a notice, pursuant to Rule 23(c)(2), FED. R. CIV. P., to be sent to all prospective members of the class, including movants. The notice described the nature of the action and informed those to whom the notice was sent that they could elect to be excluded from the action or to remain in the class and be represented either by counsel for the named plaintiff or by an attorney of their own choosing. Approximately 600 persons received the notice; of these, 535 became class members by not executing and returning the form (included with the notice) indicating their desire to be excluded. On January 4, 1967 the district court directed that the members of the class be notified of its order of that date setting a deadline of March 1, 1967 for the appearance of counsel of the class members' own choosing, but repeating what was said in the original notice, that such appearance was not necessary and, absent obtaining their own counsel, the interests of the class members would be represented by counsel for the named plaintiff. Prior to this order, Midwestern had filed requests under Rules 33 and 34, FED. R. CIV. P., for production

of certain documents and records and for answers to interrogatories by the named plaintiff and each member of her class. On December 22, 1966 the court granted the motion to produce, directing compliance by March 1, 1967, and also instructed counsel for the named plaintiff and the defendant to agree on the form of the interrogatories to be submitted.

On January 12, 1967, at the district court's direction, counsel for the named plaintiff mailed to each class member, including movants, copies of the January 4 order, the order to produce documents, and the agreed-upon interrogatories. Plaintiff's counsel also prepared and mailed a memorandum describing the discovery proceedings, explaining the reason for the interrogatories and the production of documents, specifically mentioning the March 1 deadline for compliance, and encouraging each class member to seek the advice and help of his own lawyer, if he had one, or to request assistance from plaintiff's counsel.

On February 20, 1967 counsel for the named plaintiff wrote each class member, including movants, who had not responded to the interrogatories or the order for production, reminding them that their responses were required by March 1, 1967. The letter ended by repeating that if there were any questions, the recipient should contact his attorney or plaintiff's counsel.

At a pre-trial conference, held on April 17, 1967, the court directed counsel for the named plaintiff to prepare a list of those who had not yet answered the interrogatories or produced the documents. The judge stated that he would dismiss with prejudice the claims of such persons unless they responded within twenty days. On May 4, 1967, plaintiff's counsel wrote those, including movants, who had not complied with the discovery orders, explaining

the consequences of their noncompliance. The letter read in part: "Obviously, we cannot predict the outcome of this case. If, however, you permit your claim to be dismissed, and we ultimately recover damages from Midwestern United Life, you would not be permitted to share in the recovery. . . . We ned your cooperation, however, if we are to recover any moneys on your behalf. Please send us your answers to the Interrogatories and the documents subject to production by June 1, 1967."

On June 7, 1967 the district court ordered the unresponsive members of the class, including movants, to show cause on or before July 14, 1967 why their claims should not be dismissed with prejudice for failure to answer the interrogatories. On June 9 counsel for the named plaintiff sent to all who had not responded copies of the show-cause order together with a letter warning them that unless the interrogatories were answered by July 14, their claims would be dismissed with prejudice. The letter read in part: "Obviously you are not required to participate in the case if you have no desire to do so. . . . On the other hand, if we are successful . . . we would hate for you to lose your share of the recovery merely because you have failed to answer the Interrogatories in accordance with Federal Court procedure."

The July 14 deadline passed; and on August 9, 1967 Midwestern filed its motion to dismiss with prejudice the claims of those class members, including the movants, who had failed to respond either to the interrogatories or to the show-cause order. On August 17, 1967 the court granted the motion and dismissed the claims with prejudice.

The fraud action was tried in January 1968 and judgment was entered on June 26, 1968. Determination of the individual claims of the class members was referred to a special master. On September 29, 1969 this court affirmed

the judgment of the district court. On March 11, 1970 the movants filed their motion to set aside the August 17, 1967 order dismissing their claims. Notice of the motion was given to all those similarly situated, informing them that they would be represented by movants' counsel unless they wished to be represented by counsel of their own choosing and that the court's ruling would be binding on them. Following a hearing, the court denied the motion; from that ruling this appeal was taken.

I.

Midwestern first stresses the policy in favor of finality of judgments and the limited grounds on which a Rule 60(b) motion may be granted. Rule 60(b) contains fixed one-year time limits for invoking clauses (1), (2) and (3) and requires the motion to be filed within a "reasonable time" with respect to clauses (4), (5) and (6). Midwestern argues that the unreasonable two and one-half year interval between the dismissal of movants' claims and the filing of their Rule 60(b) motion forecloses consideration of the merits of movants' challenge to the discovery ordered by the district court.

Generally, in reviewing a lower court's denial of a motion under Rule 60(b), our function is not to determine whether the court was substantively correct in entering the judgment from which relief is sought but is limited to deciding whether the judge abused his discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown in a timely manner. *See, e.g., Ackermann* v. *United States*, 340 U. S. 193 (1950); *Wojton* v. *Marks*, 344 F. 2d 222 (7th Cir. 1965). While Rule 60(b) is not a substitute for an appeal and the finality of judgments ought not be disturbed except on very narrow grounds, a liberal construction should be

given the rule to the end that judgments which are void or are vehicles of injustice not be left standing. *Klapprott* v. *United States*, 335 U. S. 601, *judgment modified*, 336 U. S. 942 (1949). Accordingly, we believe that the circumstances of this case, including the basis for the relief sought, are such that we may properly make a primary inquiry into the legality of the discovery orders and the procedures leading to the dismissal of movants' claims. We base our conclusion on the following considerations.

We note first that even though movants may have engaged in "sideline sitting" until Midwestern's liability was finally established, this case is still in progress; at the time the briefs in this appeal were filed, the special master had not yet determined the claims of all other class members. We conceive no extraordinary hardship on defendant if it is determined that movants and the class they represent should be afforded the relief they seek. Further, if we accept movants' contention that the district judge erroneously assumed the power to direct interrogatories to "absent" class members, it is at least arguable that the dismissal of movants' claims is void. Consequently, an injuiry into the merits appears unavoidable.

Finally, the discovery orders here were made in a somewhat unusual setting and movants' noncompliance resulted in the drastic sanction of dismissal of their claims with prejudice. Even though movants took no affirmative action to pursue their claims, never discussed their claims with attorneys, and were before the district court only through the person of the representative plaintiff, they are now faced with the possibility that their failure to respond to court orders communicated to them by mail may have extinguished forever their fraud claims against Midwestern and that their failure promptly to appeal may have deprived them of any effective appellate review of the

dismissal of their claims. Under these circumstances, we believe that principles of fairness warrant our giving full consideration to the merits of movants' arguments.

II.

We turn then to the merits of movants' challenge to the dismissal of their claims. Movants contend that absent class members are not "parties" to a suit and are consequently not subject to the "party" discovery procedures provided by Rules 33 and 34, FED. R. CIV. P. Movants argue that Rule 23, FED. R. CIV. P., contemplates an adversary contest involving only the representative member of a class, with all other members of the class being permitted passively to await the outcome of the principal suit, and that it is inconsistent with the purpose of Rule 23 to require any affirmative action from absent class members before the conclusion of the representative suit. While the question is a difficult one and there is some merit in movants' arguments, we hold that absent class members may, under certain circumstances, be required to submit to discovery under Rules 33 and 34 and that the sanctions of Rule 37 are available to compel compliance with such discovery orders.[2]

Note should be made initially that there is a paucity of recorded precedent in this area. A few district courts

2. Movants have argued that the dismissal of their claims under Rule 37 was an unduly harsh sanction and constituted an abuse of discretion. Movants ignored repeated requests that they comply with the discovery orders. Under the facts of this case, dismissal was warranted. Movants apparently contend that an appropriate sanction for a class member's failure to respond to discovery would be exclusion from the class. We agree that in many cases that would be an appropriate remedy. See *Minnesota* v. *United States Steel Corp.*, 44 F. R. D. 559, 557-78 (D. Minn. 1968). As we have stated, however, the district judge did not abuse his discretion in imposing on movants the more severe sanction of dismissal of their claims.

have indicated that some form of discovery may be required of class members. *E.g., Harris* v. *Jones*, 41 F. R. D. 70, 74-75 & nn. 9 & 10 (D. Utah 1966); *Minnesota* v. *United States Steel Corp.*, 44 F. R. D. 559, 557-78, 582 (D. Minn. 1968); *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 43 F. R. D. 452, 459 (E. D. Pa. 1968). *But cf. Korn* v. *Franchard Corp.*, 50 F. R. D. 57, 59-60 (S. D. N. Y. 1970); *Berman* v. *Narragansett Racing Ass'n*, 48 F. R. D. 33, 338 (D. R. I. 1969). Professor Moore has noted that, "A court may . . . give a dual or an additional notice, under [Rule 23](d)(2) to class members who do not opt out and require them to take some affirmative action as a condition of ultimate recovery." 3B J. MOORE, FEDERAL PRACTICE ¶ 23.55, at 23-1161 (2d ed. 1969).

Rule 23 in terms does not speak of discovery from class members, but the spirit of the rule would seem to encompass such procedure, particularly when subsection (d) is considered. See Professor Moore's observation, *supra*.[3]

3. Rule 23(d) provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members of signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

In *Harris* v. *Jones*, 41 F. R. D. 70, 74 n. 9 (D. Utah 1966), Judge Christensen relied specifically on Rule 23(d) in requiring absent class members to furnish information relevant to their claims.

We do not believe there is any real inconsistency between Rule 23's general policy of permitting absent class members to remain outside the principal action and our holding that in appropriate cases absent class members may be required to submit to discovery. It is true that an absent class member is given a "free ride" under Rule 23 and has no duty to actively engage in the prosecution of the action. Yet the absent class member's interests are identical with those of the named plaintiff and his rights and liabilities are adjudicated in the principal suit. If discovery from the absent member is necessary or helpful to the proper presentation and correct adjudication of the principal suit, we see no reason why it should not be allowed so long as adequate precautionary measures are taken to insure that the absent member is not misled or confused. While absent class members should not be required to submit to discovery as a matter of course, if the trial judge determines that justice to all parties requires that absent parties furnish certain information, we believe that he has the power to authorize the use of the Rule 33 and 34 discovery procedures.

The record shows that the district judge had valid reasons from the standpoint of preparing the case for trial for ordering the discovery in this case. The requests were not designed solely to determine the identity and amount of the class members' claims, but were also directed at obtaining information relating to certain defenses raised by Midwestern in the principal trial. Counsel for the named plaintiff admitted that the information sought by Midwestern was relevant to its claim that it was not liable to the class.[4] Moreover, movants impliedly concede that the discovery was proper by their argument

4. In fact, however, the information obtained tended to establish liability. Plaintiff's counsel testified on deposition for purposes of the hearing on the Rule 60(b) motion that: "Our case was benefited through these discovery efforts."

that Midwestern could have proceeded with its pre-trial discovery under Rules 30 and 31, FED. R. CIV. P., to which the sanctions of Rule 45, FED. R. CIV. P., are applicable. Finally, there is nothing in the record to suggest that the discovery procedures were used as a tactic to take undue advantage of the class members or as a stratagem to reduce the number of claimants.

Movants argue, with some persuasiveness, that the initial notice under Rule 23(c)(2) which informed the class members that, unless they indicated a desire to be excluded, they would be included in the action which the named plaintiff and her counsel would prosecute on their behalf is inconsistent with a subsequent requirement that the absent class members furnish discovery information. Movants contend that the initial notice implied that class members could remain passive throughout the principal proceeding, and that consequently a subsequent requirement that a class member take some affirmative action is not only likely to create confusion in his mind but contradicts the implied understanding by which he elected to participate in the suit.[5] The initial notice, however, in no way suggested that subsequent directions from the court could be ignored; and there can be little question about the adequacy of the subsequent notices concerning the discovery orders and the consequences of failure to supply the required information. It is not disputed that movants and those similarly situated received actual notice of the show-cause order and counsel's letter transmitting a copy to them. Nor is it disputed that they had previously received notice of the orders requiring the discovery and counsel's communications relating to the necessity for

5. Movants cite *Korn* v. *Franchard Corp.*, 50 F. R. D. 57, 60 (S. D. N. Y. 1970): "[T]here appears to be a fundamental inconsistency in providing, on the one hand, that a member who fails to request exclusion shall be *included* in the class and, on the other hand, that a member who fails to file a proof of claim shall be *excluded*. . . ."

compliance. Moreover, even if movants had an initial impression that no action on their part was required to join the class and thereby participate in a recovery, if any, that impression should have been completely dispelled by the subsequent orders of the court and the efforts of counsel for the named plaintiff to get a response to those orders.

Movants further contend that due process was denied them because they were inadequately represented by counsel for the named plaintiff. They say that counsel not only should have resisted the request for discovery, but should have either taken an appeal or advised one.

Since we have considered movants' arguments on their merits (in effect giving them an appeal) and have concluded that the discovery proceedings were proper, this argument loses much of its strength. But even if it could be said that counsel should have opposed the requested discovery, that does not imply that movants were inadequately represented. Adequate representation does not demand absence of error in judgment. At the time the suit was designated a class action, the district court determined that the class members would be represented adequately by the named plaintiff and her counsel. The successful prosecution of the action serves to confirm that determination. Members of a class, having had full notice of the proceedings and the opportunity to seek the advice of a lawyer of their own choosing and not having availed themselves of that opportunity, may not ignore the advice of qualified counsel for the class and later complain about the advice given.

Movants have also attempted to build a due process claim on their contention that the notices they received from the district court were inconsistent and confusing. There is no merit to this argument. The standard for determining due process requirements concerning notice was set forth by the Supreme Court in *Hansberry*

v. *Lee*, 311 U. S. 32, 42 (1940): "[T]here has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." That standard was met in the instant case.

In summary, we hold that absent members of a class who receive notice of the pendency of the class suit may be subjected to the party discovery procedures permitted under the Federal Rules. Before ordering such discovery, a trial court must be assured that the requested information is actually needed in preparation for trial and that discovery devices are not used to take unfair advantage of "absent" class members. Moreover, adequate notice must be given so that such persons are fully informed of the discovery order and the possible consequences of their noncompliance with it. In this case both requirements were observed.

The order denying the motion to set aside the dismissals of the claims of movants and those similarly situated is affirmed.

STEVENS, *Circuit Judge*, dissenting. Movants were not parties to the litigation in which the district court purported to adjudicate their rights. They were not involuntary parties because they were not served with process. None of them became voluntary parties by entering an appearance or taking any other affirmative action.

A litigant may "stand in judgment" for absent parties only to the extent that their interests are of the same class. *Hansberry* v. *Lee*, 311 U. S. 32, 44. In this case no litigant stood in judgment for movants. The judgment purporting to dismiss their claims with prejudice was predicated solely on a factor which differentiated them from the rest of the class.

Unlike the other class members, movants were unwilling or unable to respond to the discovery orders. In my opinion, they had a right to request exclusion from the class as an alternative to responding; they were never advised of any such right, and no such request was made on their behalf. They had no representative in court to advocate protection of their separate interests, whatever they may have been, in not divulging the requested information. Yet it is those separate interests which led to the entry of a judgment against them.

If the class was to be divided into two parts, each was entitled to separate representation by a party qualified to stand in judgment for absent members before their rights could be determined. In my opinion the requirement of adequate representation refers less to the professional competence of counsel than to the identity of the interests of the representative party and those for whom he is permitted to stand in judgment. In this case movants' interest in avoiding the sanction of dismissal with prejudice—as opposed to the possible sanction of exclusion from the class—was a matter of indifference to the representative plaintiff. For that reason, which is entirely unrelated to the skill of counsel, movants were not adequately represented by any party to the case.

Since they were not parties to the litigation, movants could not be direct parties to the judgment. Since the judgment did not even purport to bind any party who represented them, it had no indirect impact on their rights. Indeed, in my opinion a judgment which does not even purport to bind any party to the litigation is a nullity.

I respectfully dissent.

APPENDIX II.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Thursday, September 23, 1971

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. OTTO KERNER, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

TORA C. BRENNAN, *Plaintiff*,
No. 18682 *vs.*
MIDWESTERN UNITED LIFE INSURANCE COMPANY, *Defendant*.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

APPEAL OF CLAUDE M. HERRIMAN, ET AL.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above entitled cause, a vote of the active members of the court was requested, and a majority of the active members of the court having voted to deny a rehearing and rehearing *en banc*,

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

Judge Stevens and Judge Sprecher voted to grant said rehearing en banc.

Judge Pell disqualified himself from "any participation in passing on the petition."

APPENDIX III.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

STATE OF ILLINOIS, *Plaintiff*, *vs.* HARPER & ROW PUBLISHERS, INC., ET AL., *Defendants.* AND RELATED CASES.	No. 67 C 1899.

ORDER.

Objections of certain plaintiffs to interrogatories propounded by defendants were discussed at the pre-trial conference held on January 23, 1970. Upon consideration of the oral argument and briefs related thereto, the court hereby ORDERS:

Interrogatory 7 seeks a title-by-title breakdown of the prices paid by plaintiffs for each library edition in suit, the prices they believe they would have paid absent the conspiracy or conspiracies, and aggregates of these figures. As applied to the named plaintiffs, much of this information duplicates that provided in another form by the answers to transaction interrogatories. As applied to class members who are not formal parties, this interrogatory would accomplish what this court has repeatedly refused to allow, for it would effectively extend the Exhibit "D" interrogatories to these plaintiffs.

Plaintiffs presumably have available the aggregate fig-

ures requested by 7(c) and (d), or soon will have them available. The objections to these subsections are therefore overruled, and plaintiffs shall provide the answers thereto at the close of their discovery. In all other respects, the objections to Interrogatory 7 are sustained.

Interrogatories 10, 11 and 12 ask for exhaustive and multi-faceted summaries of each discussion participated in by a defendant with regard to prices or terms of sale of individual books. They are relevant to a central issue in these cases, viz., the existence *vel non* of the conspiracy or conspiracies.

Questions seeking all of a party's evidentiary material on substantive issues, however, are beyond the proper scope of interrogatories, invade the trial component, and need not be answered. *United States* v. *Renault, Inc.*, 27 F. R. D. 23 (S. D. N. Y. 1969); *United States* v. *Grinnell Corporation*, 30 F. R. D. 358 (D. R. I. 1962). Therefore, plaintiffs shall be required to answer these interrogatories only to the extent of identifying the dates of the meetings and discussions which they intend to rely on to prove conspiracy (10a, 11a, 12a), the participants therein (10c, 11c, 12b), and the deposition pages (10j, 11j, 12k) and other documents (10k, 11k, 12l) which they believe support their claim as to each such meeting or discussion. *Cf. United States* v. *Procter & Gamble*, 25 F. R. D. 252, 254 (D. N. J. 1960). These answers shall be due at the close of plaintiffs' discovery. In all other respects, the objections to these interrogatories are sustained.

Interrogatory 15 seeks data regarding plaintiffs' costs which bears no apparent relationship to the subject matter of these cases. The objection is therefore sustained.

Interrogatories 22 through 42 seek myriad minute details from each class member regarding virtually all of the circumstances surrounding each individual purchase of library, trade and prebound editions. Plaintiffs object

that the information sought is irrelevant, burdensome and oppressive.

Defendants contend that certain of these interrogatories are related to matters which they intend to raise by way of defense. Thus, they claim that plaintiffs, by rejecting low bids, failed to mitigate their damages. And they argue that plaintiffs received benefits in the form of services and lowered prices on other goods which compensated for any overcharge on library editions.

Plaintiffs invite the court to rule on the legal sufficiency of these defenses, in the hope that the interrogatories might thereby be narrowed. Such a ruling would be improvident at this time, however, for the issues have not been fully briefed. Moreover, a determination that these defenses are legally insufficient would not appreciably limit the interrogatories.

The standard of relevance applied to interrogatories must be given a liberal interpretation, *Triangle Manufacturing Company* v. *Paramount Bag Manufacturing Co.*, 35 F. R. D. 540 (E. D. N. Y. 1964), and this is especially true of discovery geared to complex antitrust litigation. *Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.*, 40 F. R. D. 96 (N. D. Ill. 1966). Viewed in this light, the interrogatories here objected to have some relevance to a number of issues in the case other than these defenses, such as fraudulent concealment, causation and amount of damage.

Even relevant interrogatories need not be answered, however, if they impose undue burdens on the interrogated parties. See, generally, 4 Moore, *Federal Practice*, ¶ 33.20. In a case of this nature, with each plaintiff's stake relatively small, requiring investigation and preparation of answers to multitudinous interrogatories by each plaintiff might well serve to close the judicial doors to class actions

of this nature. *State of Illinois* v. *Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 489-91 (N. D. Ill. 1969).

When less burdensome means of discovery are available, they should be used. *Schotthofer* v. *Hagstrom Construction Co.*, 23 F. R. D. 666, 668 (S. D. Ill. 1958). Both plaintiffs and defendants in their briefs have indicated a willingness to agree upon less oppressive means for gathering the information sought. It might be possible to use sampling techniques, directing questions to a limited number of class members selected randomly, on the basis of comprehensiveness of records, or by some other means. Questionnaires could be formulated inquiring into the purchasing practices of representative plaintiffs, followed by depositions of knowledgeable employees, if necessary.

The objections to Interrogatories 22-42 will therefore be sustained at this time. If the parties are unable to agree on alternative means of discovery such as sampling, these interrogatories or other less burdensome avenues of discovery will be considered.

ENTER:

/s/ BERNARD M. DECKER,
United States District Judge.

Dated: February 13, 1970.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JAN 12 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-778

CLAUDE M. HERRIMAN, OTTO L. KEELER, JR., OTTO L. KEELER, JR., as Executor of the Estate of OTTO L. KEELER, SR., and ALBERT W. COLLIER,

Petitioners,

v.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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Petitioners,

v.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the District Court for the Northern District of Indiana, from which the appeal now before this Court was taken, appears as an appendix to this brief.

QUESTION PRESENTED

The question presented for review is whether the District Court abused its discretion in denying a motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside its earlier order dismissing the claims of certain class

members with prejudice for failing to comply with the court's orders for pretrial discovery in this case where

(1) the information sought was reasonable, relevant and necessary to the defense in preparing for trial, and

(2) the class members were fully and fairly notified and advised of the information required and of the consequences of failing to supply it.

STATEMENT OF THE CASE

The petitioners are four persons who were members of the plaintiff class in *Brennan* v. *Midwestern United Life Ins. Co.*, 259 F.Supp 673 (N.D. Ind. 1966); 286 F.Supp. 702 (N.D. Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 397 U.S. 989, 90 S.Ct. 1122 (1970) (the "original action"). The original action charged that Midwestern United Life Insurance Company ("Midwestern") had violated Section 10(b) of the Securities Exchange Act of 1934 by aiding and abetting the fraudulent activities of Dobich Securities Corporation ("Dobich"), a securities dealer. Dobich's practice was to accept orders and payment for stock in various companies, including Midwestern, when Dobich did not own the stock. Purchase of the stock by Dobich and delivery to his customers would occur only after long periods of delay during which Dobich used the money for speculations. These proved to be disastrous. The action was brought on behalf of a class consisting of all persons who had paid Dobich for the purchase of stock in Midwestern which Dobich failed to deliver. The basis of the complaint in the original action was that Midwestern knew, or should have known from information available to it, that Dobich was engaging in fraudulent

practices, and that Midwestern failed to report such practices to the Securities Commissioner in order to derive benefits from a higher market price for its stock which resulted from Dobich's activities (App. 34).[1]

Promptly after the District Court determined that an action could be maintained under Section 10(b) for failure to report fraudulent activities to the Securities Commissioner and that the case should proceed as a class action (259 F.Supp. 673), the names and addresses of the class members were obtained from the Dobich records, and notices of the pendency of the original action were mailed to all members of the class, including the petitioners, on October 12, 1966 (App. 39-41). The notices described the nature of the case and informed the class members that they could elect to be excluded from the action by returning an enclosed form, or remain in the class and be represented either by counsel for the class or by an attorney of their own choosing. There were approximately 600 persons who had purchased shares in Midwestern from Dobich but did not receive delivery (App. 128). Of these, approximately 535, including the petitioners, became class members (App. 123) under the provisions of Rule 23.

On December 21, 1966, Midwestern filed a motion for production of certain documents and a set of 13 interrogatories to be submitted to each member of the plaintiff class (App. 42-46). *The interrogatories and motion for production sought information relevant and necessary in preparing to defend against liability to the class.*[2]

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[1] References denoted "App." are to the Appendix filed on the appeal of this case to the Circuit Court of Appeals, Cause No. 18682, which Appendix has been certified to this Court.

[2] One matter of defense was to persuade the District Court that the information which Midwestern had concerning Dobich's slow deliveries could not reasonably be expected to have put Midwestern on notice of the fraudulent nature of Dobich's activities and cause it to report them to

At the first pretrial conference, on December 22, 1966, the court granted the motion for production and ordered that the documents be produced on March 1, 1967 (App. 49-50). It discussed the interrogatories and, after considering various objections to their form and means for facilitating the answers (App. 124-27), ordered counsel for Midwestern and for the class to put the interrogatories in suitable form for submission to the members of the class (App. 53). This was accomplished by January 12, 1967 (App. 54), and there were mailed to each member of the class, including the petitioners: (1) the interrogatories, in multiple choice form or with space for writing in the answers immediately following each question (App. 55-65); (2) the court's order for production of documents (App. 49); (3) an order extending the time for entering appearances by counsel to March 1, 1967 (App. 51-52); and (4) a memorandum (App. 86-90) prepared by counsel for the class explaining in detail the discovery proceedings, the re-

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the Securities Commissioner. In preparing that portion of its defense, Midwestern sought to show by the answers to the interrogatories that many persons, some of whom were knowledgeable in financial and securities matters (App. 56-58), knew that Dobich was extremely slow in delivering stock but did not themselves notify the authorities (App. 59). Another important line of defense was causation. It was the plaintiff's theory that if Midwestern had reported what it knew about Dobich's late deliveries to the Securities Commissioner he would promply have stopped Dobich's fraudulent activities. Midwestern contended—and sought to prove in part through the answers to the interrogatories (App. 59)—that numerous purchasers from Dobich had made complaints to the Securities Commissioner (complaints of which on deposition the Commissioner had no recollection) and had communicated to him more information than was available to Midwestern, and that there was nothing which Midwestern could report to him that he did not already know from communications from class members. A third important subject of the interrogatories was to discover any communication to a Midwestern employee concerning Dobich or his activities about which Midwestern (and its attorneys) did not know and which might be the occasion for surprise at the trial if not discovered (App. 59, 63). The interrogatories were directed to discovering matters essential to the preparation of the defense against liability and to an appraisal of the exposure.

sponsibilities of the class members with respect to these proceedings, and the handling of the interrogatories and documents to be produced.[3]

Most of the class members responded. Some, including the petitioners, did not. A long series of letters, notices and a show-cause order was sent to each of the class members who had not responded to the interrogatories. These communications were typewritten and reproduced in easily readable form. They explained in the simplest terms what was required and what the consequences would be for failing to respond.[4] The series of communications and

---

[3] The memorandum explained the interrogatories and said in part (App. 89):

> "We are enclosing a self-addressed envelope, for your convenience in returning to us a signed copy of the Interrogatories, and the various documents that have been requested by the other side. If you have employed a lawyer to act on your individual behalf, I am certain he will help you review the materials and answers required. If you have not employed independent counsel, do not hesitate to telephone Sidney Mishkin, of our office, for any help you may require in connection with these Interrogatories."

[4] On February 20, 1967, counsel for the class sent a letter (App. 92) to all class members who had not responded to the interrogatories or the court's order for production reminding them of the March 1 deadline. On May 4, 1967, counsel for the class again wrote to those who still had not responded, imploring them to answer. The letter said in part (App. 93-94):

> "* * * Obviously, we cannot predict the outcome of this case. If, however, you permit your claim to be dismissed, and we ultimately recover damages from Midwestern United Life, you would not be permitted to share in the recovery.
>
> "* * *
>
> "* * * Thus far, the Court has sustained our legal theory. Let your family lawyer read the decision of Judge Eschbach as reported in 259 Federal Supplement 673 (1966). We need your cooperation, however, if we are to recover any moneys on your behalf.
>
> "Please send us your answers to the Interrogatories and the documents subject to production by June 1, 1967.
>
> "If you no longer have the Interrogatories or the Order for Production of Documents which we sent you on January 12, 1967, let us know immediately so that we can provide you with these documents."

warnings of dismissal with prejudice persuaded most of the delinquent class members to answer (App. 132-33) and resulted in much relevant information which was introduced into evidence at the trial. It did not, however, persuade the petitioners.

On August 9, 1967, Midwestern filed its motion (App. 68-69) to dismiss with prejudice the claims of those class members, including the petitioners, who had failed to make any response to any of the discovery orders. The motion was granted (App. 70-71), and those affected, including the petitioners, were promptly notified (App. 85, 135).

Trial of the original action took place in January, 1968, and resulted in a judgment in favor of the class on June 26, 1968. The District Court's decision was appealed and

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The extended deadline of June 1 passed and the court entered its order (App. 95-96) directing the unresponsive members of the class, including the petitioners, to show cause on or before July 14, 1967, why the action as to them should not be dismissed with prejudice for failure to respond to Midwestern's interrogatories.

On June 9, 1967, counsel for the class transmitted (App. 85) copies of the show-cause order to the unresponsive members of the class, accompanied by a letter (App. 96-97) again warning those persons of the consequences of their inaction and attempting to persuade them to respond. That letter said in part (App. 96-97):

> "The simple way to show such cause and to avoid dismissal with prejudice is to answer the Interrogatories. If you do not answer the Interrogatories on or before July 14, 1967, your claim will be dismissed with prejudice by the Court.
>
> "There are approximately 535 persons in the class. Approximately 493 have answered Defendant's Interrogatories, and will participate in the case. Persons who do not answer the Interrogatories and show cause will not be permitted to remain in the class.
>
> "Obviously you are not required to participate in the case if you have no desire to do so. Equally obviously, we cannot guarantee a successful outcome. On the other hand, if we are successful in making recovery on behalf of Mrs. Brennan and the other class members who lost heavily in this situation, we would hate for you to lose your share of the recovery merely because you have failed to answer the Interrogatories in accordance with Federal Court procedure."

affirmed by the Seventh Circuit on September 29, 1969. On March 11, 1970, more than *two and one-half years* after the petitioners were notified of the dismissal of their claims with prejudice, they filed their Rule 60(b) motion to set the order of dismissal aside.

After due notice, a hearing on the Rule 60(b) motion was held June 12, 1970. At the hearing no evidence was introduced that the petitioners did not receive the notices, orders, communications and entreaties which were mailed to them. There was no evidence that they did not read and fully understand each of them. There was no evidence that the interrogatories were unduly burdensome to the petitioners. There was no evidence that they did not make a considered choice in refusing to respond or participate further in the action. There was no evidence of any action or effort which could have been taken, but was not, that would have caused the petitioners to respond.

The District Court found that the information sought by the discovery was "highly relevant" and that, contrary to the petitioners' assertion, there was "nothing in the record or before this court to suggest that defendants had a 'scheme' to make 'improper use of discovery procedures' and thereby deprive" petitioners of their day in court (App. 112). The District Court denied the motion, and the Court of Appeals for the Seventh Circuit affirmed. The majority opinion stated that normally in reviewing a lower court's denial of a motion under Rule 60(b), it was not the function of the Court of Appeals to determine whether the judgment from which relief is sought was substantively correct, but that it had nevertheless done so in this case and had given full consideration to the merits of the petitioners' arguments. It held that party discovery procedures with respect to class members were properly em-

ployed in this case where (1) the information sought was reasonable, relevant and necessary to the defense in preparing for trial, and (2) the class members were fully and fairly notified and advised of the information required and of the consequences of failing to supply it.

REASONS WHY THE WRIT SHOULD BE DENIED

The majority opinion of the court below states what must be the law if the facts required for a proper presentation of a class action such as this are to be known or knowable. A feasible method of enforcing necessary discovery from class members, properly supervised as the opinion below provides, is essential to adequate trial preparation in a case such as this. The petitioners' sweeping assertion that the decision may sound the death knell for Rule 23 class actions because it encourages broad motions to produce and extensive and burdensome interrogatories ignores not only the trial court's broad powers under Rule 26(c) to guard against oppression from over-zealous discovery, it also ignores the facts in this case and what the decision below held. The majority summarized its decision as follows:

> "In summary, we hold that absent members of a class who receive notice of the pendency of the class suit may be subjected to the party discovery procedures permitted under the Federal Rules. Before ordering such discovery, a trial court must be assured that the requested information is actually needed in preparation for trial and that discovery devices are not used to take unfair advantages of 'absent' class members. Moreover, adequate notice must be given so that such persons are fully informed of the discovery order and the possible consequences of their noncompliance with it. In this case both requirements were observed." (Pet. A13)[5]

[5] References denoted "Pet." are to the Petition for Certiorari.

The court did not hold that discovery is appropriate in every class action or that dismissal with prejudice is the only proper remedy for the failure of class members to respond when discovery is needed. It held that discovery and dismissal was proper in *this* case, where it was highly probable that class members had essential information going to the merits of the litigation, where they had abundant notice and explanation of what was required and how to respond, and where the smallest claims amounted to hundreds of dollars and most were in the thousands of dollars.[6] The guidelines prescribed by the court are explicit and reasonable. While protective of class members, the decision leaves a measure of discretion with the trial court to enforce discovery where actually needed in preparation for trial, as it was in this case. The decision in no way conflicts with the decision of any other Circuit, or any decision of this Court, or any concept of fairness or due process.

The Discovery Procedures Followed Were Wholly Proper

Contrary to the petitioners' charge that burdensome interrogatories were used to reduce the size of the class in this case (Pet. 2, 3), not one independent person—nor Judge Stevens, who wrote the dissenting opinion in the Court of Appeals—has suggested that Midwestern's discovery was improper, unnecessary, irrelevant, or burdensome, or should have been curtailed in any respect, or that it was used for any improper purpose. The District Court approved the discovery at the time it was ordered and confirmed that ruling in disposing of the petitioners' Rule 60 (b) motion. It found

> "Contrary to movants' assertion, there is nothing in the record or before this court to suggest that

[6] The claims of the four petitioners, for example, aggregated $70,000 (App. 138).

defendants had a 'scheme' to make 'improper use of discovery procedures' and thereby 'deprive claimants [movants] of their day in court.' As noted above, the interrogatories and documents sought to be produced were highly relevant to *both* plaintiff's and defendant's cases. Lead counsel for plaintiff, an experienced and highly competent lawyer, believed that defendant was entitled to obtain information concerning the contacts between class members and Dobich and was himself desirous of obtaining such information. In fact, as lead counsel states: 'Our [plaintiff's] case was benefited immeasurably from information obtained through these [defendant's] discovery efforts.' Movants' further assertion that the information sought to be elicited by defendant's discovery was 'either known at the time or was not material' is patently incorrect." (App. 12)

The Court of Appeals confirmed that assessment. It said

> "The record shows that the district judge had valid reasons from the standpoint of preparing the case for trial for ordering the discovery in this case. The requests were not designed solely to determine the identity and amount of the class members' claims, but were also directed at obtaining information relating to certain defenses raised by Midwestern in the principal trial. Counsel for the named plaintiff admitted that the information sought by Midwestern was relevant to its claim that it was not liable to the class. Moreover, movants impliedly concede that the discovery was proper by their argument that Midwestern could have proceeded with its pretrial discovery under Rules 30 and 31, FED. R. CIV. P., to which the sanctions of Rule 45, FED. R. CIV. P., are applicable. Finally, there is nothing in the record to suggest that the discovery procedures were used as a tactic to take undue advantage of the class members or as a strategem to reduce the number of claimants." (Pet. A10-11)

At the hearing on their Rule 60(b) motion, the petitioners had an opportunity to show in what way the interrogatories were burdensome, or that they did not understand the clear, straightforward communications of counsel for the class, or that they were somehow lulled into inaction. They claimed none of these things. Their sole objection reduces to an argument that party discovery procedures, as distinguished from witness discovery procedures, cannot be permitted in class actions. The argument disregards Rule 23 and is erroneous.

The petitioners received notices of the pendency of the class action, which spelled out to them their right to exclude themselves from the class. The notice even included a form for ease of doing so. The petitioners chose not to exercise that option, and thus became members of the class. Thereafter they were subject to the court's orders, the same as any other claimant. There is no basis whatsoever for the conclusion that a court which had jurisdiction to enter a res judicata judgment for or against the petitioners, and which had full power "to determine the course of proceedings" (Rule 23(d)(1)), did not have authority to enforce proper discovery through the sanction of dismissal.

The petitioners contend that they should have been given the right to exclude themselves in lieu of responding to discovery. The obvious answer to this contention is that they expressed no such desire—to the court, to their counsel, or to anyone else. Moreover, the argument that the petitioners should have been given the right to exclude themselves in lieu of responding to discovery totally ignores the reason for having the sanction of dismissal available in discovery proceedings. That reason is, in fairness, to enable the party against whom the action is brought to force those in whose behalf the action is brought to disclose facts and matters which may tend to support the defense,

or shed additional light on the claim, and thereby provide for a proper adjudication of the case.

Without the sanction of dismissal in class actions such as this, there would be a very grave practical limitation upon discovery. A later, permissive exclusion from the class, as urged by the petitioners, is not a sanction. Nor does it have any efficacy. It would not relieve the claimant of the ultimate requirement to disclose the facts if his claim were to be realized, and it would not provide a feasible method of obtaining needed information. Such a privilege of "second round" exclusion would accomplish little, other than to keep pertinent facts hidden, while ultimately leaving those choosing to be so excluded with precisely the same election as the petitioners had in this case—to respond to proper discovery or forego their claims.[7]

The petitioners characterize the dismissal of their claims as "unduly harsh" (Pet. 6). Would it have been more appropriate for the court to insist upon witness, rather than party, discovery procedures and resort to the harsher sanction of contempt under Rule 45, instead of the thoroughly appropriate sanction of dismissal with prejudice under Rule 37, which is available where the disobeying party has a claim which can be dismissed? Would fining or jailing the petitioners have been more appropriate?

The petitioners complain that their "separate interests" were not represented in court (Pet. 9). But we are left to guess just what these "separate interests" were. The peti-

[7] In other cases, where the possibility of discovering important information is remote and the nature of the class and the claims may be quite different from those in this case, it might well be within the trial court's discretion to allow "second-round" exclusion, but it was certainly within the court's discretion to choose the more effective sanction of dismissal under the facts of this case. The threat of dismissal assisted in obtaining answers to interrogatories from approximately 164 class members who, up to that time, had not responded adequately or completely.

tioners had an opportunity at the hearing on their motion to explain what interest, if any, it was that they were protecting by not answering the interrogatories. They offered none. They state that their interest is recovery against Midwestern, but that is precisely the same interest as was possessed by the rest of the class in the original action. The petitioners had no "separate interest." They were practicing a new form of an old evil which the 1966 amendments to Rule 23 were intended to prevent—sideline sitting. It was only *after* they were dismissed, as a result of their own persistent refusal to heed the advice of counsel for the class or seek counsel of their own, that the interests of the petitioners became separate.

The petitioners had, and chose to ignore, far more process than was their due. At every step of the proceedings, from the original communication notifying them of the class action, through the entire stream of correspondence from the court and from counsel for the class setting out in detail their responsibilities and the possible result of their failure to fulfill those responsibilities, the petitioners received a measure of due process which in form and substance met the most rigid standards of fairness.[8]

The "problems" which the petitioners foresee as arising from this decision (Pet. 11) are totally unrelated to *the facts* of this case and to *what the court below held.* In short, they are imagined. If, as the decision of the Court of Appeals requires and as was done in this case, adequate notice

[8] As bearing upon the matter of fairness, it may be noted that the Court of Appeals in reviewing the decision of the District Court holding Midwestern liable to the class, described the original action as a "close case" 417 F.2d 150. The information which Midwestern obtained from the class members who complied with the discovery requests provided substantial assistance in the defense of the original action. It did not provide enough for Midwestern to prevail. What would have been gained from the class members who did not respond, and how it would have affected the outcome in the original action, cannot now be known.

is given so that class members are fully informed of the discovery order and the possible consequences of noncompliance with it, the risk of defaulting a class member who has not received the interrogatories is eliminated.[9] The number of interrogatories which may be filed in a given case and the degree of completeness required[10] are obviously discretionary matters for the trial court, which, the Court of Appeals declares, must assure itself that the requested information is needed in preparation for trial and that the discovery is not used to take unfair advantage of "absent" class members. The trial courts have ample power to assure themselves of these matters, and the District Court did so in this case.

District Court Decisions Are Not In Conflict

The petitioners' assertion that decisions of the district courts are in conflict with respect to discovery in class actions is unfounded. The petitioners have not cited one case in which the court has concluded that it was without authority to impose discovery responsibilities upon class members *where the need for, and reasonableness of, discovery has been shown.* The petitioners' cases, to the extent they are relevant at all, support the established and uniform practice that discovery matters in class actions, as in all actions, are within the sound discretion of the trial court.

In *State of Illinois* v. *Harper & Row Publishers, Inc.*, No. 67-C-1899 (N.D. Ill.) (Pet. A17-20), the court declined to require class members to answer interrogatories which

[9] It should be noted again that no such claim was made by these petitioners on behalf of themselves or of the "dismissed" class which they represent.

[10] No claim of a class member was dismissed because his response to discovery was incomplete or inadequate. Only the claims of those class members totally failing to respond were dismissed (App. 131).

it variously characterized as "multitudinous," "exhaustive" and "multifaceted" and "seek[ing] myriad minute details." Far from holding that under no circumstances would interrogatories to class members be proper, the court suggested to counsel that they direct interrogatories "to a limited number of class members selected randomly" (Pet. A20). In *Fischer* v. *Wolfinbarger,* CCH Fed. Sec. L. Rep. ¶ 93,235 (W.D. Ky. 1971), certain of the refused interrogatories repeated matters already covered in proofs of claim previously required by the court to be filed by 3,000 class members (at p. 91,454). In *Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions,* CCH Trade Reg. Rep. ¶ 73,482 (S.D. N.Y. 1971), the court merely declined to require that proof of claims be filed prior to trial of the case, as it clearly had discretion to do.

Korn v. *Franchard Corp.,* 50 F.R.D. 57 (S.D. N.Y. 1970), involved only the question of pretrial proof of claim forms. Even there, however, the court expressly recognized (at p. 60) its authority in a proper case to require affirmative action by class members. In *Berman* v. *Narragansett Racing Ass'n,* 48 F.R.D. 333 (D. R.I. 1969), the court also declined to require proof of claim forms for the express reason that "unlike *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.,* 43 F.R.D. 452, at 459 (E.D. Pa. 1968) [where proof of claim forms were required] [it] will not now expedite or clarify this action." *Id.* at 338. These are not holdings that the court may not authorize discovery directed to members of the class when such discovery is necessary to an adequate preparation for trial.

What authority there is on the issue fully supports the existence of the trial court's right to authorize discovery from members of the class. In *State of Minnesota* v. *United States Steel Corp.,* 44 F.R.D. 559 (D. Minn. 1968), inter-

rogatories were authorized to "all members of the class," 44 F.R.D. at 582. In *Research Corp.* v. *Pfister Associated Growers, Inc.*, 301 F.Supp. 497 (N.D. Ill. 1969), a patent infringement action against defendants as a class, the court ordered that discovery was open to "both sides." 301 F.Supp. at 504. Discovery directed to class members was approved by the court in *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 41 F.R.D. 42 (S.D. N.Y. 1966). *Cf.*, Moore, Fed. Prac. ¶ 23.55, pp. 23-1160-61.

While this may properly be referred to in the words of the Court of Appeals as a "paucity of recorded precedent," the very lack of reported cases in which discovery authorized against class members has been questioned demonstrates the capacity of the district courts to deal effectively with such matters. It also demonstrates the wisdom of the majority opinion below in recognizing the need of trial courts to have reasonable discretion in dealing with discovery in class actions.

CONCLUSION

The decisions below are based upon the facts of this case. They do not, as the petitioners' argument seems to suggest, adopt a new rule or statute. They decide a case—this case. The opinion of the Court of Appeals affirms the District Court's discretion to enforce discovery procedures in accordance with the reasonable requirements of the particular case before it. To the extent that the case involves a broad principle, it is simply that one sued in a class action has the right reasonably to discover from the class members facts needed for the defense of the lawsuit, and that class members who elect to participate in the suit have a duty to assist the administration of justice in at least a

minimal way by disclosing facts pertinent to the case. This is not the introduction of a novel concept in American jurisprudence and does not constitute any departure from fundamental fairness or due process. It is entirely consistent with the long-established federal policy that the ends of justice are best served by providing a practical means for discovery of all pertinent facts.

The decision of the Court of Appeals is reasonable, and it is right. The petitioners' request for a writ of certiorari raises no question that is unsettled or which needs deciding by this Court. It should be denied.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

TORA C. BRENNAN,
Plaintiff,

v.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,
Defendant.

FORT WAYNE CIVIL No. 1716

MEMORANDUM OF DECISION AND ORDER

This action is before the court upon a motion under Rule 60(b) (4) and (6), FED. R. CIV. P., to set aside a dismissal with prejudice entered on August 17, 1967 against those initial members of plaintiff's class who had failed to answer defendant's interrogatories or to comply with the court's show cause order of June 7, 1967. This motion was filed on March 11, 1970 by C. M. Harriman, Otto L. Keeler, Jr., Otto L. Keeler, Jr. as Executor for the Estate of Otto L. Keeler, Sr., and Albert W. Collier on behalf of themselves and all other initial members of plaintiff's class whose actions and claims were similarly dismissed by this court's order of August 17, 1967.

The named movants and those other initial members of plaintiff's class who were dismissed for failure to answer defendant's interrogatories on August 17, 1967 hereinafter will be referred to collectively as the "movants." The movants' names and addresses were contained on Exhibit A attached to defendant's Motion to Dismiss, filed on August 9, 1967. A copy of said Exhibit A is attached hereto as Appendix A.

Pursuant to an order of this court, counsel for the named movants informed all other movants (1) of the

nature of the named movants' Motion for Relief from Order of Dismissal, (2) of the date, time and place of the hearing upon the motion, (3) that they may, if they wish, enter an appearance through counsel of their own choosing, (4) that if they do not enter an appearance through counsel of their own choosing, the counsel for the named movants will represent their interests in this motion, and (5) that this court's ruling upon this motion, whether favorable or unfavorable, will be binding upon all initial members of plaintiff's class listed in Appendix A who were dismissed on August 17, 1967. Named movants' counsel mailed such notice to all other movants on May 15, 1970 by regular United States mail at the address which appears on Appendix A, as evidenced by an affidavit of mailing.

Hearing upon this motion was held before this court on June 12, 1970. The court has received and considered briefs.

The named movants contend that under Rule 60(b) (4) and (6), FED. R. CIV. P., this court should set aside the dismissal of movants' actions and claims against the defendant because that order (1) is void, (2) violates procedural due process, (3) is based upon failure to answer improperly propounded and served interrogatories, and (4) inequitably permits a wrongdoer to eliminate class members on preliminary procedural grounds. For the reasons discussed below, the court finds the movants' contentions to be totally without merit.

I. Factual Background

A. *Of the Action Generally*

This securities fraud action initially came before the court upon defendant's motion to dismiss for failure to state a cause of action and to dismiss the claim insofar as it was a class action. The complaint alleged that the defendant, an issuer of securities, had aided, abetted, and assisted, by its failure to report improper activities of a brokerage firm, Dobich Securities Corporation, the alleged violations, by said brokerage firm, of Section 10(b) of the Securities Exchange Act of 1934. This court held that the

complaint stated a cause of action and that the action could properly be maintained as a class action under Rule 23(b) (3). *Brennan v. Midwestern United Life Ins. Co.*, 259 F.Supp. 673 (N.D.Ind. 1966). A notice of pendency of the class action was mailed to all members of plaintiff's class on October 12, 1966. This notice contained all the information required by Rule 23(c) (2), including that final judgment entered in this case would include and would be binding upon all members of the class who did not request exclusion, whether or not the judgment was favorable to the plaintiff. Movants were notified and did not request to be excluded from the class.

As will be described below in detail, movants were dismissed from the action by order of this court on August 17, 1967. Subsequently, after a bench trial, this court found in favor of the plaintiff and the remaining members of her class. *Id.* 286 F.Supp. 702 (N.D.Ind. 1968), *aff'd*, 417 F.2d 147 (7th Cir. 1969), *cert. denied*, 90 S.Ct. 1122 (1970). The determination of the amount of recovery to which each member of plaintiff's class is individually entitled is currently before a special master.

It has already been determined that this action was a proper class action. *Id.* 259 F.Supp. at 683-84. With respect to the issues raised by this motion for relief from an order dismissing initial members of plaintiff's class, the applicable notice requirements of Rule 23(c) (2) were fulfilled, as described above, by the notice mailed to all members of the named movants' class.

B. *Background on Dismissal of Movants*

On December 19, 1966, defendant filed a motion for the production of documents by plaintiff and each member of her class. Defendant sought all correspondence, order forms, cancelled checks, memoranda, and similar communications between Dobich Securities Corporation and the members of plaintiff's class. Defendant contended that such documents and written communications were relevant to the action because they would tend to indicate the extent of knowledge of each class member concerning Dobich's

activities and the respective dates when such knowledge was acquired, as compared with the extent of defendant's knowledge of such activities. Such documents, defendant further contended, would also tend to indicate whether defendant's alleged failure to report Dobich's practices was a proximate cause of any alleged loss. Defendant finally contended that such information would tend to show whether each member of plaintiff's class exercised reasonable care to avoid the loss for which recovery was sought. On December 22, 1966, this court granted defendant's motion for production of these documents from the plaintiff and all members of her class.

At the first pre-trial conference on December 26, 1966, the matter of the interrogatories submitted by defendant were discussed. The interrogatories concerned the business experience of members of plaintiff's class and their stock purchase transactions over a period of years. As embodied in Paragraph 7 of the First Pre-trial Conference Order, entered January 4, 1967, attorneys for plaintiff and defendant were directed to put defendant's interrogatories in a form most suitable for submission to the class members.

On January 12, 1967, an explanatory memorandum was prepared by counsel for plaintiff, a copy of which is before the court, which described the nature and import of the proceedings in this action to that date. This memorandum, together with two copies of defendant's interrogatories, a copy of the order of production, and a copy of the First Pre-trial Conference Order were mailed by plaintiff's counsel to all creditors of Dobich Securities Corporation who were members of plaintiff's class and had not requested that they be excluded from the class action. The completion of this mailing to the class members, *including the movants*, was evidenced by an affidavit of plaintiff's counsel filed on January 24, 1967. The explanatory memorandum specifically advised class members that they could telephone designated members of plaintiff's counsel's law firm for any assistance in connection with the interrogatories.

On February 20, 1967, plaintiff's counsel sent a letter to each class member who had not responded to the interrogatories and the order for production of documents. This

letter, a copy of which is before the court, reminded these class members that their answers and documents must be received by March 1, 1967 and that they could contact plaintiff's counsel if they had any questions.

On April 17, 1967, a second pre-trial conference was held. Paragraph 2 of the Second Pre-trial Conference Order, entered May 2, 1967, directed plaintiff's counsel to furnish the court with a list of all persons who had not responded by June 1, 1967. This order further provided that the court would thereafter consider entering an order which would dismiss with prejudice those nonresponding class members unless their answers and documents were received by plaintiff's counsel within 20 days after the entry of such an order.

On May 4, 1967, an additional memorandum was sent by plaintiff's counsel to all class members who had not sent answers to interrogatories and documents subject to production. This memorandum, a copy of which is before the court, reminded the nonresponding class members that if their claims were dismissed with prejudice for failure to respond, they could not share in any recovery. The memorandum explicitly described the portions of the Second Pre-trial Conference Order concerning dismissal of nonresponding class members.

On June 7, 1967, the court ordered those members who had not answered defendant's interrogatories to show cause on or before July 14, 1967 why their actions and claims should not be dismissed with prejudice for failure to respond to defendant's interrogatories.

On June 9, 1967, plaintiff's counsel prepared an explanatory memorandum to accompany the mailing of the court's show cause order of June 7, 1967. This letter, a copy of which is before the court, explained the effect of not answering the interrogatories by July 14, 1967. The mailing of this explanatory memorandum and the court's show cause order to all nonresponding class members, *including movants* here, was completed by June 12, 1967, as evidenced by an affidavit of mailing filed on June 14, 1967.

On August 9, 1967, defendant filed a motion to dismiss with prejudice those members of plaintiff's class who had

failed to answer its interrogatories. Exhibit "A" attached to that motion, containing five pages, set forth the names and addresses of the persons who had failed to answer the interrogatories. That listing is attached hereto as Appendix A.

On August 17, 1967, this court entered an order dismissing with prejudice the actions and claims of all persons listed on Exhibit A attached to defendant's motion.

On August 23, 1967, copies of that order of dismissal were mailed by plaintiff's counsel to all persons who were dismissed, as evidenced by an affidavit of mailing filed with this court on August 30, 1967. Movants did not file their present motion until March 11, 1970, over two and a half years after the dismissal.

II. Movants Not Entitled to Relief Under Rule 60(b)

A. *Relief under Rule 60(b) is not a substitute for appeal and is granted within the discretion of the court.*

At no time has any movant filed with the clerk of this court a notice of appeal from the order of dismissal. Pursuant to Rule 4, Fed. R. App. Proc., movants lost their right to appeal from the order of dismissal thirty days after its entry. It is clear that this motion for relief under Rule 60(b) is not a substitute for the appeal which was not taken. *See Ackermann v. United States*, 340 U.S. 193 (1950). *See generally* 7 MOORE, FEDERAL PRACTICE § 60.18 [18] (1954) (hereinafter cited as MOORE).

In order to obtain relief under Rule 60(b), the petitioner must show both that the grounds for such relief falls within one or more of the six reasons specified within Rule 60(b) (1) to (6) *and* that these circumstances justify relief from the operation of the order. *See Klapprott* v. *United States*, 335 U.S. 601 (1949); *Ackermann* v. *United States, supra; Flett* v. *W. A. Alexander & Co.*, 302 F.2d 321 (7th Cir. 1962), *cert. denied*, 371 U.S. 841; *Rinieri* v. *News Syndicate Co.*, 385 F.2d 818 (2d Cir. 1967). In this case, the movants may *not* rely upon the grounds for relief specified in Clauses 1-3 of Rule 60(b) because a motion for relief based upon any of these reasons was required to have been made within

one year of the order of dismissal. Consequently, as grounds for relief, movants must show either that the order of dismissal was "void" within the meaning of Rule 60(b)(4) or that the circumstances of their case present those "exceptional circumstances" not within the scope of the other reasons enumerated in Rule 60(b) (1) to (3), which circumstances constitute one of the unforeseen contingencies properly within the residual clause, Rule 60(b) (6). *See Klapprott* v. *United States, supra; Ackermann* v. *United States, supra; Flett* v. *W. A. Alexander & Co., supra. See generally* MOORE §§ 60.18[8] and 60.27.

Where the district court is presented with a reason permitting relief under Rule 60(b), then its determination to grant or deny relief involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted. *See Flett* v. *W. A. Alexander & Co., supra* at 324. *Rinieri* v. *News Syndicate Co., supra* at 822. Professor Moore has summarized some of the factors which the district court may consider in exercising its discretion on whether to grant relief under Rule 60(b) as follows:

> "the general desirability that a final judgment should not be lightly disturbed; the procedures provided by Rule 60(b) is not a substitute for an appeal; the Rule should be liberally construed for the purpose of doing substantial justice; whether, although the motion is made within the maximum time, if any, provided by the Rule, the motion is made within a reasonable time; if relief is sought from a . . . judgment of dismissal where there has been no consideration of the merits, whether in the particular case the interest of deciding cases on the merits outweighs the interest in orderly procedure and in the finality of judgments . . . ; and any other factor that is relevant to the justice of the judgment under attack, bearing in mind that the principle of finality of judgments serves a most useful purpose for society, the courts, and the litigants—in a word, for all concerned." MOORE § 60.19, at 225-26 (footnotes eliminated).

The named movants brief states that the issue before this court is:

> "[W]hether or not the defendant insurance company will be allowed .... to subvert the purpose of Rule 23(b)(3) by eliminating members of the class in the preliminary stages of the case by the improper use of discovery procedures and thus ... to deprive the claimants of their day in court and opportunity to present meritorious claims against the wrongdoer?" Br. p. 5.

This is not, however, the issue before this court. The issue presented by this motion is: Whether the circumstances surrounding the dismissal of the movants present grounds for relief under Rule 60(b)(4) or (6) and, if they do, whether setting aside the dismissal is an appropriate remedy to accomplish justice. *See Klapprott* v. *United States, supra* at 614-15.

B. *No grounds for relief under Rule 60(b)(4) since dismissal is neither void nor denial of procedural due process*

Named movants argue in their brief that Rule 33 permits interrogatories to be served only upon named parties and not upon members of a class. Because the use of Rule 33 by defendant was "improper," movants conclude that therefore "the order of dismissal for failure to comply is void" and that "to allow the defendants [sic] to eliminate members of the class in this matter [manner] violates the concepts of fair play and procedural due process." Br. 9-10.

Even assuming *arguendo* that defendant could not, under Rule 33, serve interrogatories upon members of plaintiff's class, nevertheless the order of dismissal for failure to answer these interrogatories was neither "void" nor did it violate movants' constitutional right to due process. Whether a judgment or dismissal is "void" is not determined by ascertaining whether it was substantively correct or valid. *See* MOORE § 60.25[2]. Rather, whether a judgment or dismissal is void is determined by ascertaining whether the court possessed subject matter jurisdiction

and personal jurisdiction over the objecting party. *See id.* Therefore, if this court has subject matter jurisdiction and personal jurisdiction in this action, its dismissal was not void—even if (as is *not* true) the dismissal was substantively incorrect.

It is indisputable that this court has subject matter jurisdiction over this action which alleged a violation of the Securities Exchange Act of 1934. *See* 15 U.S.C.A. § 77v and 28 U.S.C.A. § 1331. Movants do not contend, nor could they contend, that this court lacked personal jurisdiction over them in this action. Accordingly, movants' contention that their dismissal was void is wholly without merit.

In addition to contending that this order of dismissal was "void," movants argue that the dismissal deprives them of procedural due process. It is true that *if* a court's proceedings were conducted in so arbitrary or improper a manner that its actions constituted a denial of due process, then a judgment or dismissal rendered pursuant to such a procedure would also be "void" within the meaning of Rule 60(b)(4). *See* MOORE § 60.25[2] at 270-71. *Cf. Pittston* v. *Reeves,* 263 F.2d 328 (7th Cir. 1959).

What the Constitution requires by way of procedural due process in class actions can be determined from two Supreme Court decisions, *Hansberry* v. *Lee,* 311 U.S. 32, 41-44 (1940), and *Mullane* v. *Central Hanover Bk. & Trust Co.,* 339 U.S. 306 (1950). In *Hansberry,* the Court stated the general principle that:

> "there has been a failure of due process only in those [class actions] where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry* v. *Lee,* supra at 42.

In *Mullane,* the Court further specified what type of notice to absent members of a class was required in order to comply with the requirements of due process.

> "[I]n any proceeding which is to be accorded finality . . . notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an oppor-

> tunity to present their objections [is required by due process]." *Mullane* v. *Central Hanover Bk. & Trust Co., supra* at 314.

Where, as in this case, the names and addresses of persons whose interests were to be affected by the adjudication are known, the Court held that due process requires notice to be mailed to them. *Id.* at 318-20.

Movants herein were in no way deprived of procedural due process. As described in detail above, copies of this court's notice of pendency of class action (Oct. 12, 1966), orders to produce (Dec. 22, 1966) and to answer defendant's interrogatories (Jan. 4, 1967), order to show cause (June 7, 1967), and order of dismissal with prejudice (Aug. 17, 1967) were mailed to all movants. Moreover, plaintiff's counsel mailed movants a memorandum explaining the orders to produce and to answer the interrogatories (Jan. 12, 1967), a letter reminding them of the March 1, 1967, deadline for answers (Feb. 20, 1967), a further letter exhorting answers and warning of the possibility of dismissal (May 4, 1967), and a letter explaining the significance of the show cause order (June 9, 1967).

It should be noted that movants do not contend that these procedures in any way failed to comply with the notice requirements of Rule 23(c) and (e).

C. *Exceptional circumstances required as grounds for relief under Rule 60(b)(6) not present*

Movants' remaining two arguments for relief—that dismissal was based upon improperly propounded interrogatories and that the use of the dismissal was inequitable—do not rely upon any of the grounds specified within Clauses (1) to (5) of Rule 60(b). Evidently, movants rely upon the residuary clause (6) of Rule 60(b).

As noted above, in order to come within Rule 60(b)(6), the movants must establish that the circumstances of their dismissal present "exceptional circumstances." *See Klapprott* v. *United States, supra; Ackermannn* v. *United States, supra; Flett* v. *W. A. Alexander & Co., supra.* As Professor Moore's correctly states:

"Like Rule 60(b) generally, clause (6) should be liberally applied to situations not covered by the preceding five clauses so that, giving due regard to the sound interest underlying the finality of judgments, the district court, nevertheless, has the power to grant relief from a judgment whenever, under all the surrounding circumstances, such action is appropriate in the furtherance of justice.

"It is important to note, however, that clause (6) contains two very important internal qualifications to its application: first, the motion must be based upon *some reason other than those stated in clauses (1)-(5);* and second, the other reason urged for relief must be such as to *justify* relief.

* * *

"Like 60(b) generally, clause (6) cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, a party will not be granted relief from a judgment under clause (6): even though relief from a judgment might have been obtained had an appeal been taken. . . ." MOORE § 60.27[1] at pp. 295, 297-98 (emphasis in original).

Movants contend that the *only* affirmative action which Rule 23 requires members of a Rule 23(b)(3) class to take is sending notice to the court if they wish to be excluded from the class. Accordingly, they argue that it was "improper" for this court to require that class members answer interrogatories and produce documents during the pretrial stages of this litigation. Movants admit, however, that there is no judicial support for their arguments. Rather, there are four district court cases which contemplate and approve requiring affirmative action by class members at the pre-trial stages of litigation.

In a class action for alleged violations of Section 10(b) of the Securities Exchange Act of 1934, a district court, relying upon Rule 23(d) and its inherent general powers, ordered all members of the class to file statements which included facts similar to the interrogatories served upon the movants herein. *Harris* v. *Jones,* 41 F.R.D. 70, 74-75

(D.Utah 1966). The *Harris* court ordered class members to file statements describing:

> "the types and sources of representations, if any, upon which they relied in purchasing their securities and the time they first learned any representations were false. An order will be made, and notice given, that if such statements without good cause are not filed within the time specified the action may be *dismissed with prejudice* as to defaulting members. . . ." *Id.* (emphasis added, footnote omitted.)

In a class action antitrust suit, another district court specifically authorized the defendants to pose "interrogatories to plaintiff and all members of the class" concerning the transactions between the plaintiff's class (purchasers) and the defendants (manufacturers). *Minnesota* v. *United States Steel Corp.*, 44 F.R.D. 559, 582 (D.Minn 1968).

At least four district courts have ordered that class members during the early pre-trial stages of litigation must submit intentions of filing claims or proof of claims or be barred from recovery. *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F.Supp. 391, 403-404 (S.D.Iowa 1968) (citing *Harris* v. *Jones, supra*, with approval); *Philadelphia Elec. Co.* v. *Anaconda Amer. Brass Co.*, 43 F.R.D. 452, 459, 462 (E.D.Pa. 1968); *Minnesota* v. *United States Steel Corp., supra* at 577-78; *Harris* v. *Jones, supra.*

Contrary to movants' assertion, there is nothing in the record or before this court to suggest that defendants had a "scheme" to make "improper use of discovery procedures" and thereby "deprive claimants [movants] of their day in court." As noted above, the interrogatories and documents sought to be produced were highly relevant to *both* plaintiff's and defendant's cases. Lead counsel for plaintiff, an experienced and highly competent lawyer, believed that defendant was entitled to obtain information concerning the contacts between class members and Dobich and was himself desirous of obtaining such information. In fact, as lead counsel states: "Our [plaintiff's] case was benefited immeasurably from information obtained through these [defendant's] discovery efforts." Movants' further asser-

tion that the information sought to be elicited by defendant's discovery was "either known at the time or was not material" is patently incorrect.

Accordingly, movants have failed to demonstrate any of the "extraordinary circumstances" which would be grounds for relief under Rule 60(b)(6).

D. *Justice in no way warrants relief under Rule 60 (b)(6).*

As an alternative basis for denying movants relief under Rule 60(b)(6), even assuming *arguendo* that movants had demonstrated (which is *not* the case) the exceptional circumstances and unforeseen contingencies which empower a court to grant relief under Rule 60(b)(6), the movants have totally failed to show that permitting them to now share in the recovery of the class would be in furtherance of justice. In other words, under the circumstances of this case it is not inequitable to deny movants relief.

The named movants assert in their unverified brief that none of them "had any knowledge of the legal implications of these matters" until October 1969 when the news media carried a story about the Court of Appeals for the Seventh Circuit affirming this court's finding in favor of plaintiff's class. It is difficult for this court to conceive how movants could remain "without any knowledge of the legal implications" of their failure to answer defendant's interrogatories when *movants were mailed nine (9) written communications concerning these interrogatories, their obligation to answer them, and the consequences of failing to answer them.* Approximately 80% of the initial class did respond and apparently understood the "legal implications."

The form, extent and content of the notices mailed to the movants with respect to the interrogatories far exceeds any and all requirements of procedural due process. Movants have waited over two and one-half years to object to their dismissal. They did not object to the interrogatories at the time they were served nor at the time of the show cause order. They did not appeal their dismissal. In fact

they did nothing until it was evident to them that plaintiff had been victorious. At this point they seek to be readmitted as members of the now-victorious class. Granting relief under these circumstances would not be unlike reviving the old evil of "one way" intervention in class actions, which the 1966 amendments to Rule 23 were intended to eliminate, in a different form. *See* Notes of Advisory Comm., 28 U.S.C.A., Rules of Civil Pro., Rule 23; p. 82.

The striking dissimilarity between the facts and circumstances of this case and those in *Klapprott* which, if they were true, the Supreme Court held entitled Klapprott to relief from a default judgment of denaturalization under Rule 60(b)(6) is evident from the following language from *Klapprott:*

> "[Klapprott's petition's] allegations set up an extraordinary situation which cannot fairly or logically be classified as mere 'neglect' on his part. The undenied facts set out in the petition reveal far more than a failure to defend the denaturalization charges due to inadvertence, *indifference,* or *careless disregard of consequences.* For before, at the time, and after the default judgment was entered, petitioner was held in jail in New York, Michigan, and the District of Columbia by the United States, his adversary in the denaturalization proceedings. Without funds to hire a lawyer, petitioner was defended by appointed counsel in the criminal cases. Thus petitioner's prayer to set aside the default judgment did not rest on mere allegations of 'excusable neglect.' . . . [H]e was *deprived of any reasonable opportunity to make a defense* to the criminal charges instigated by officers of the very United States agency which supplied the secondhand information upon which his citizenship was taken away from him in his absence. The basis of his petition was not that he had neglected *to act in his own defense,* but that in jail as he was, weakened from illness, without a lawyer in the denaturalization proceedings or funds to hire one, disturbed and fully

occupied in efforts to protect himself against the gravest criminal charges, he was no more able to defend himself in the New Jersey court than he would have been had he never recived notice of the charges." *Klapprott* v. *United States, supra* at 613-14 (emphasis added).

Even *assuming* that the movants herein ever had any basis upon which to object to their dismissal, denial of relief to them under Rule 60(b)(6) at this time and under these circumstances in no way constitutes an injustice nor violates any concept of due process.

ORDER

For the reasons discussed above, the motion for relief from this court's order of dismissal of August 17, 1967 made upon behalf of the named movants and upon behalf of all other persons similarly situated whose names appear in Appendix A attached hereto for relief under Rule 60(b), FED. R. CIV. P., is denied in its entirety.

Entered this 17th day of June, 1970.

JESSE E. ESCHBACH
United States District Judge

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-778

CLAUDE M. HERRIMAN, ET AL.,

Petitioners,

vs.

MIDWESTERN UNITED LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY BRIEF.

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Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITIONERS' REPLY BRIEF.

Midwestern United Life Insurance Company in its Brief in Opposition to Petition for Writ of Certiorari has wholly failed to answer or even acknowledge the urgent and important questions raised in the Petition with regard to the construction and interrelationship of Rules 23, 33, 34 and 37 of the Federal Rules of Civil Procedure. This Court has the primary power and responsibility for the proper functioning of the Federal judiciary, and under such general powers prescribes the rules of procedure for

the several District Courts. In the day to day operation of the rules, the District Courts cannot interfere with the substantive rights of litigants and for these reasons this is a significant case.

The Respondent has thus attempted to cloud the issues by arguing what it considers to be the merits of the case. Midwestern United Life Insurance Company talks of fairness in allowing discovery and states that the Petitioners received more process than was their due, but where is the fairness in excluding from a recovery the innocent victims of a fraud to the benefit of the Respondent as an adjudicated wrongdoer, and where is due process where the Petitioners were dismissed out of the class action in a manner which adjudicated their rights but without an opportunity to be heard or present their rightful claims? These unsupported arguments and self-serving statements made by Midwestern United Life Insurance Company can and will be answered in order to show that justice requires a reversal of the court below in the event this Court exercises its discretionary jurisdiction and grants the writ. Arguments upon the merits, however, are not the issue now before the Court.

This attempt by Midwestern United Life Insurance Company to cloud the issues follows its consistent pattern of failure to recognize the important legal principles involved in the interpretation of the Federal Rules of Civil Procedure now under consideration. This inability or unwillingness to face the issues is an additional reason for this Court to review the case. This is a truly significant case with regard to the administration of the Federal judiciary and the interpretation of this Court's rules.

Since the filing of the Petition herein, the *Duke Law Journal* has published a note in its December, 1971, issue which is appended hereto. The note, at Vol. 1971, *Duke Law Journal*, 1007, clearly shows the interest in and the

broad significance of the erroneous majority decision. The majority opinion, if allowed to stand, will have a detrimental effect upon thousands and thousands of innocent class members who will become involuntary participants in pre-trial discovery maneuvering in class actions.

Petitioners again urge that this case is a particularly appropriate one for the exercise of the Court's discretionary jurisdiction and the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DOUGLASS R. SHORTRIDGE,
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Indianapolis, Indiana 46204,
Counsel for Petitioners.

APPENDIX.

[1007] VOL. 1971 DUKE LAW JOURNAL.

CIVIL PROCEDURE: ABSENTEE CLASS MEMBERS SUBJECTED TO DISCOVERY AND CLAIMS DISMISSED FOR FAILURE TO RESPOND.

In *Brennan* v. *Midwestern United Life Insurance Co.*,[1] the Seventh Circuit Court of Appeals held, Judge Stevens dissenting, that identifiable but absent members of a class who received notice of the pendency of the class action, and who failed to respond thereto, may be subjected to the discovery procedures of the federal rules even to the extent of having their claims dismissed with prejudice when they fail to comply with the discovery orders of the court.[2] A class action had originally been brought for damages allegedly suffered by some Midwestern United Life Insurance Co. stockholders as a result of certain fraudulent securities dealings which had been aided and abetted by Midwestern.[3] On October 12, 1966, the district court had

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THE FOLLOWING HEREINAFTER CITATIONS WILL BE USED:

2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE (Wright ed. 1961) [hereinafter cited as 2 BARRON & HOLTZOFF];

3B J. MOORE, FEDERAL PRACTICE (2d ed. 1969) [hereinafter cited as 3B MOORE];

C. WRIGHT, THE LAW OF FEDERAL COURTS (2d ed. 1970) [hereinafter cited as WRIGHT];

Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1940) [hereinafter cited as Kalven & Rosenfield].

1. ..., F. 2d .... (7th Cir. 1971).

2. .... F. 2d at ....

3. Brennan v. Midwestern United Life Ins. Co., 286 F. Supp. 702 (N. D. Ind. 1968), *aff'd*, 417 F. 2d 147 (7th Cir. 1969), *cert. denied*, 397 U. S. 989 (1970).

sent notice[4] to all known and prospective members of the stockholder class, including appellants, informing them of the nature of the suit and of their option to request exclusion from the class represented by the plaintiff, Mrs. Brennan, or to remain in the class and be represented either by the representative stockholder's counsel or by counsel of their own choice. Thereafter, the district court granted the discovery motions of Midwestern[5] requiring the stockholders to produce certain documents and records, and to respond to interrogatories. Compliance with these orders was directed by March 1, 1967. On January 4, 1967, the representative stockholder's counsel mailed to all class members copies of both the order to produce documents and the interrogatories, specifically mentioning the March 1 deadline. Counsel then sent a letter, on February 20, 1967, to those [1008] class members who had not yet responded, including appellants, reminding them of the orders and the deadline. On April 17, 1967, the district court ordered that the claims of any class member not responding to the discovery requests within twenty days would be dismissed with prejudice. Again, on May 4, 1967, the stockholders' counsel wrote to those class members, including appellants, who had not yet complied, warning them of the sanction which would be imposed for continued noncompliance. Finally, on August 17, 1967, the district court granted Midwestern's motion to dismiss with prejudice the claims of all class members who had failed to respond to either the interrogatories or a subsequently entered show-cause order. When the class action ultimately came to a conclusion nearly a year later, judgment was entered in favor of the stockholder class. Appellants then

4. Pursuant to FED. R. CIV. P. 23(c)(2).

5. Pursuant to FED. R. CIV. P. 33 & 34.

filed a motion to set aside the August 17, 1967 order dismissing their claims with prejudice. The district court denied that motion,[6] and the Seventh Circuit affirmed.

Prior to adoption of the class action device, compulsory joinder was the only means by which a large group of plaintiffs could successfully bring their claims into the federal courts in suits which were classified as "legal."[7] Mass joinder, however, was an awkward and unwieldy procedure when the potential group of interested persons was large, inasmuch as it necessarily presupposed the prospective plaintiffs advancing on the courts en masse.[8] This problem was particularly severe when the stake of each member of the group was inadequate to impel him to accept the burdens involved in prosecution of a suit.[9] As the inadequacy of the mass joinder procedure became apparent, attention was focused on the development of a procedural vehicle which would allow mass suit.[10] The result was the class action, which made adjudication of such cases possible[11] by allowing representatives of a large group of interested persons to sue or be sued on behalf of the whole group, thus obviating the necessity of joining all members.[12] The class action was originally provided for in Equity Rule 38, which allowed the use of a class action where there were common interests within the group, too many [1009] interested persons to be brought before the court at one time, and a representative of the class who would fairly present the case for the entire group.[13] The

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6. ..... F. 2d at .....
7. 2 BARRON & HOLTZOFF § 561; 3B MOORE ¶ 23.02, at 23-72.
8. Kalven & Rosenfield 687-91.
9. *Id.*
10. WRIGHT § 72, at 306.
11. 2 BARRON & HOLTZOFF § 561, at 254.
12. WRIGHT § 72, at 306.
13. 3B MOORE ¶ 23.02, at 23-74.

principal difference between the Equity Rule 38 class action and the mass joinder rules was the point at which the plaintiffs were organized: after a favorable judgment in the former, and before trial in the latter.[14] When the Federal Rules of Civil Procedure were adopted in 1938, an attempt was made to encourage the expanded use of class actions[15] by allowing their use in situations where permissive joinder would be proper,[16] thereby eliminating the previous rule that class actions were available only in situations which would have required compulsory joinder.[17] Rule 23 was changed extensively in 1966. While the same basic requirements of numerosity, impracticability of joinder, and adequacy of representation were retained,[18] certain provisions were introduced which strengthened the effect of judgments in class actions[19] and made it a more effective method for obtaining relief for relatively small injuries to large numbers of persons.[20] Of particular significance

14. Kalven & Rosenfield 691.

15. The class action was made available for *all* civil actions, whether formerly denominated legal or equitable. In the past the class action had been available only in equity cases. WRIGHT § 72, at 306.

16. Permissive joinder would be proper where the claims for relief of an interested person arise out of the same transaction or series of transactions as those sued upon, and involve common questions of law or fact. *See* FED. R. CIV. P. 20(a).

17. 3B MOORE ¶ 23.02-1, at 23-77.

18. *Id.* at 23-121.

19. It has been recognized that the judgment in a class action represents an exception to the general rule that, unless one was a party to an action, or was made a party by service of process, he is not bound by the judgment in the action, although the extent of this exception remains imprecisely defined. Hansberry v. Lee, 311 U. S. 32 (1940). *See* Pennoyer v. Neff, 95 U. S. 714 (1877); 2 BARRON & HOLTZOFF § 561, at 63, § 572, at 125 (C. Wright & F. Elliott ed., Supp. 1970).

20. The Advisory Committee Note to Rule 23 states that the availability of class actions is extended by Rule 23(b)(3), as revised in 1966, to include controversies in which there are questions of law or fact common to all members of a group, and addi-

for present purposes, the 1966 amendments gave the court broad powers to better administer class actions.[21] Rule 23(d) provides the courts with wide [1010] discretion in assuring the fair and efficient adjudication of class actions.[22] Specifically included is the power to require responses from members of the class to enable the court to effectively define the scope of, and fairly administer the action.[23] Rule 23(d)(1) and (d)(5), for example, empowers the court to resist the delay and confusion which tend to occur in any action affecting a large number of persons,[24] to determine the sequence of the proceedings, to expedite the litigation, and to protect the interests of absent class members.[25] On its face, however, the rule places no duty of affirmative action on absent class members.

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tionally, that the use of the class action device would contribute to efficiency in adjudication and uniformity in decisions affecting large numbers of people. Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B. C. IND. & COM. L. REV. 501, 504-07 (1969); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 397-98 (1966).

21. Rule 23(d) provided the court with the power to make appropriate orders to determine the course of proceedings or prescribe measures to promote efficiency in the presentation of the case; to require that notice of the course of the proceedings, the extent of the judgment, and the rights of absentees to enter appearances be given to members of the class; and to impose conditions on the representative or on intervenors or to require necessary amendment to the pleadings. The orders may be combined with an order under Rule 16, which provides for determinations by the court concerning the rules governing the presentation of expert witnesses, the calendar for the trial, and similar matters, and may be altered as may be desirable. Fed. R. Civ. P. 23(d).

22. 3B MOORE ¶ 23.70, at 23-1401.

23. Newberg, *Orders in the Conduct of Class Actions: A Consideration of Subdivision (d)*, 10 B. C. IND. & COM. L. REV. 577, 589 (1969).

24. 3B MOORE ¶ 23.71, at 23-1411 to -1412.

25. 2 BARRON & HOLTZOFF § 571 n. 79.6; 3B MOORE ¶ 23.75, at 23-1475.

The extent to which absent class members may be required to take affirmative action prior to judgment on the merits is an issue which has received very little attention.[26] Although non-present class members have been required to provide the court with information concerning the amounts of their claims and the circumstances under which they arose,[27] these requirements have not been imposed either through the use of discovery procedures or for the purpose of aiding adverse parties in the preparation of their cases.[28] Rather, the information so acquired has been used by the court to better evaluate the sufficiency of the representation being provided by the named plaintiffs, to make possible a more precise definition of the size and membership of the class than could be obtained otherwise, to determine whether subclasses should be established, and generally to [1011-] contribute to the fair and efficient adjudication of the case.[29] These purposes are entirely consistent with those set forth in Rule 23(d)[30] and are, in fact, essential for the proper maintenance of a class action. By themselves, however, such purposes provide no basis for subjecting absent class members to discovery by an adverse

26. ..... F. 2d at .....

27. Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S. D. Iowa 1968), *aff'd*, 408 F. 2d 1171 (8th Cir. 1969); Minnesota v. United States Steel Corp., 44 F. R. D. 559, 577 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F. R. D. 452, 459 (E.D. Pa. 1968); Harris v. Jones, 41 F. R. D. 70, 74 (D. Utah 1966).

28. See note 27 *supra*. In all of these cases, the requests were made at a very early stage in the proceedings, and only basic information, such as the amount claimed an the way in which the claim arose, was obtained. The concern of the court was to find out the membership of the class, and whether there were common questions of law or fact present to warrant the use of the class action device.

29. *See* Harris v. Jones, 41 F. R. D. 70, 74-75 (D. Utah 1966).

30. Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S. D. Iowa 1968); Harris v. Jones, 41 F. R. D. 70, 74-75 (D. Utah 1966); 3B Moore ¶ 23.55, at 23-1161.

party. Even where absent class members have merely been required to aid the court in the proper administration of the suit, there is no clear indication that sanction have actually been imposed for failure to respond, although some courts have stated an *intention* to exclude non-responsive members from the class[31] or to dismiss their claims with prejudice.[32] In only one case has a court gone so far as to state that, in addition to the court's requiring that absent class members return completed proof-of-claim forms, it would be allowable for the representatives of the class to request other information from the absentees, as long as no attempt was made to solicit claims.[33] The court did not, however, announce any sanction for failure to respond.[34] Thus, although some requirements have been imposed upon non-present class members, they have been primarily for the benefit of the court, not the antagonists. In no case has the court permitted a party adverse to the class to request information from absent members of the class. In the one case in which the representative of the class was allowed to make requests for information from absentees, sanctions were neither threatened nor imposed for failure of the absentees to comply. Thus, it may fairly be stated that courts have been quite reluctant to require affirmative action from absentee class members.[35]

31. Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 403-04 (S. D. Iowa 1968); Minnesota v. United States Steel Corp., 44 F. R. D. 559, 577-78 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F. R. D. 452, 459-60 (E. D. Pa. 1968).

32. Harris v. Jones, 41 F. R. D. 70, 74-75 (D. Utah 1966).

33. Minnesota v. United States Steel Corp., 44 F. R. D. 559, 577 (D. Minn. 1968).

34. *Id.*

35. Korn v. Franchard Corp., 50 F. R. D. 60 (S. D. N. Y. 1970); Berman v. Narragansett Racing Ass'n, 48 F. R. D. 333 (D. R. I. 1969).

In *Brennan* v. *Midwestern United Life Insurance Co.*, the court affirmed the district court's denial of appellants' motion to set aside the dismissal order, relying basically on the cases discussed in the preceding paragraph, and on a comment made concerning them by Professor Moore.[36] The court held that absent class members who have received notice of the pendency of the suit may be required to [1012] submit to discovery procedures and reveal information which the court finds to be "necessary or helpful"[37] to the fair presentation and adjudication of the suit. The discovery must not, however, be used to harass the absentees, and they must be fully informed of the discovery orders and the sanctions for failure to comply.[38] The court stated, in defrence to the general policy of Rule 23 giving the absent class member a "free ride"[39] as to the conduct of the case prior to judgment, that absentees should not be subjected to discovery as a routine matter. Nevertheless, the court took the view that requiring some discovery from an absent class member is compatible with Rule 23. Because the absent class member and the representative plaintiff share the same interests with respect to the subject being litigated, and because the rights and liabilities of the absentee and the representative will be adjudicated in the representative suit, the court concluded that the issuance of orders to absent class members invoking the discovery procedures of Rules 33 and 34 is a proper exercise of the powers conferred on the court by Rule 23(d) to make orders in the conduct of class actions.[40] The criterion which the court offers for determining when the use of discovery is proper, however, is practically indis-

36. 3B MOORE ¶ 23.55, at 23-1161.
37. ..... F. 2d at .....
38. *Id.* at .....
39. *Id.* at .....
40. *Id.*

tinguishable from the criteria governing the use of discovery in other kinds of civil actions. Discovery from an absent class member is allowable, according to the court, if it is "necessary or helpful" to the proper presentation and adjudication of the suit.[41] No specific reference is made to any of the subdivisions of Rule 23(d)—in which are listed the several purposes toward which orders made pursuant to Rule 23(d) should be directed—in order to indicate which of these purposes the discovery orders in this case were calculated to achieve. In any event, none of the provisions of Rule 23(d) seem to bear a significant relationship to the matter of discovery by the defendant from an absent class member affecting the substance of the case; the purposes for which the court may make "appropriate orders"[42] under Rule 23(d) deal only with maintaining the integrity of the suit as a class action. Also, the court mentions that the record did not reveal any attempt on the part of Midwestern to use discovery procedures to take advantage of class members or as a tactic to [1013] discourage claimants. But, again, this does not distinguish the scope of discovery procedures available against a party in an ordinary civil action from the scope of discovery available against an absent member of a class in a class action. Protection is afforded to all persons subject to discovery by the discovery rules themselves.[43] The dissent argued that the appellants could not properly be considered part of the stockholder class represented by Mrs. Brennan because their interests were somewhat antagonistic to those of the other members of the class by virtue of their unwillingness or inability to respond to the interrogatories. Since the representative

41. *Id.*

42. FED. R. CIV. P. 23(d). See note 21 *supra*.

43. 2A BARRON & HOLTZOFF § 715, at 231; WRIGHT § 83, at 369; Newberg, *supra* note 23, at 580.

may litigate the interests of absentees only to the extent that their interests are genuinely and thoroughly congruous,[44] the fact that their interests were divergent would have resulted in their exclusion from the class, and placed them outside any judgment rendered in the representative suit.[45]

Brennan is troublesome in several respects. There is literally no case precedent for requiring absent class members to submit to discovery by an adverse party; all but one of the cases relied upon by the court limited the requirement of affirmative action on the part of absentees to providing the court itself with information essential to the proper administration of the suit.[46] In the remaining case, it was the representative of the class, not an adverse party, who was allowed to request information from the absentees, and the court did not indicate an intention to enforce compliance with those requests through its sanction power.[47] Further, the *Brennan* court did not specifically explain how its decision could be reconciled with Rule 23. The court acknowledged the general principle that absentees stand outside the suit prior to judgment,[48] but failed to show convincingly that any provision of the rule validates the exception to that principle which its holding represents.[49] In addition to the tenuous support in [1014]

44. Hansberry v. Lee, 311 U. S. 32, 44 (1940).

45. ..... F. 2d at .....

46. These cases are cited at note 27 *supra*.

47. Minnesota v. United States Steel Corp., 44 F. R. D. 559, 577 (D. Minn. 1968).

48. See note 14 *supra* and accompanying text.

49. Professor Moore, in stating that the court may impose requirements of affirmative action on absentees, refers to the same cases relied on by the court and discussed at notes 31-35 *supra*. As has been pointed out, in all of these cases the court used its

case precedent and the language of Rule 23, the proposition that absent class members may be subjected to discovery on a scale approximately the same as parties to other kinds of civil actions diverges sharply from the trdaitional concept of the class action. Certainly the most distinctive characteristic of the class action is its representative nature. One or more members of the class sue or are sued on behalf of the whole class; by hypothesis, all members of the class are not before the court, and all are not called upon to conduct or defend the suit. This is the duty only of the representative. Although the *Brennan* court said that discovery procedures, as applied to absentees, are to be closely supervised by the court, the standard adopted for determining when such procedures would be proper is so broad that it can fairly be concluded that discovery procedures may be rather extensively used against absentees. Similarly, while the court stated that absentees should not be subjected to discovery to the same extent as parties to other kinds of civil suits, the standard adopted to govern the use of discovery against absentees is not itself limited by any such qualification. The failure of the court to circumscribe the availability of discovery against absentees thus creates a potential threat to the integrity of the class action, since it implies that the absentees are at least to some extent to be treated as parties before the court, just as is the representative. Finally, the decison represents a serious departure from one of the policies underlying the Rule 23 class action, namely that of creating a procedural device which will be genuinely effective in providing recovery to large groups of claimants whose individual stakes in the controversy

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sanction power only upon those requests made to obtain information related to the purposes of Rule 23(d), involving the administration of the suit, and not for discovery by an adverse party which would directly aid in the presentation of his case. 3B MOORE ¶ 23.55, at 23-1161.

are too small to support individual suits.[50] To be effective in this respect, it is essential that the expenditure of time and effort required of each claimant for participation in the recovery be held to a minimum. If the requirements are made too burdensome, this purpose will be frustrated, as potential class members will decide that meeting the requirements for participation in the recovery is not worth the trouble in light of the small size of the individual claims. It could well be that the refusal of appellants to respond to the interrogatories in this case was unreasonable; perhaps only a few pieces of easily [1015] obtainable information were requested.[51] But even a moderate increase in the burden of participating in a class action can be expected to discourage some claimants, and to the extent that this occurs, one important purpose of the class action will be compromised. The Seventh Circuit has possibly served notice on all present and prospective class action defendants that they now have the means to reduce the size of the class through use of the discovery process.

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50. Eisen v. Carlisle & Jacquelin, 391 F. 2d 555, 560 (2d Cir. 1968); Kaplan, *A Prefatory Note*, 10 B. C. Ind. & Com. L. Rev. 497 (1969); *The Consumer Class Action*, 49 B. U. L. Rev. 211, 407 (1969) (Parts I & II). *Cf.* Matthies v. Seymour Mfg. Co., 23 F. R. D. 64, 74-75 (D. Conn. 1958).

51. To the extent that the need for the information is thought to outweigh the burden on absentee members, this may constitute grounds for excluding such members from the class. See note 44 *supra* and accompanying text.